

EO-2594

Entered

A
MANUAL
OF THE
MAHOMMEDAN LAW
OF
INHERITANCE AND CONTRACT,
COMPRISING
THE DOCTRINES OF THE SOONEE AND SHEEA SCHOOLS,
AND
BASED UPON THE TEXT OF
SIR W. H. MACNAGHTEN'S PRINCIPLES AND PRECEDENTS,
TOGETHER WITH
THE DECISIONS OF THE PRIVY COUNCIL,
AND
HIGH COURTS OF THE PRESIDENCIES IN INDIA.

FOR THE USE OF STUDENTS.

BY
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LONDON:
W^M H. ALLEN AND CO., 18, WATERLOO PLACE, S.W.

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TO

SIR HENRY BYNG HARRINGTON, K.C.S.I.,

LATE OF HER MAJESTY'S INDIAN CIVIL SERVICE,

This Work

IS,

AS A MARK OF RESPECT,

Dedicated

(WITH PERMISSION)

BY

THE AUTHOR.

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LONDON :
PRINTED BY WOODFALL AND KINDER,
MILFORD LANE, STRAND, W C.

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INTRODUCTION.

IN the Introduction to the Treatise on the Hindoo Law of Inheritance, we observed that when the Directors of the Honourable the East India Company were compelled to undertake the government of the different provinces of India, they very wisely determined not to interfere with the laws, or religions of the natives. This was the course pursued by the Mahommedans on their conquest of the country. They abstained from interfering with the civil laws of the Hindoos, but superseded their criminal laws by that of the Koran, and the administration of the country was conducted by the British on the native model. In the time of Warren Hastings the first attempt was made to place within the reach of European intelligence a knowledge of the native laws. It was in his time that a translation was made of the *Hedayah*, a commentary on the Mahommedan laws, civil and criminal, by Mr. Hamilton. In 1793 Lord Cornwallis introduced into Bengal, a code providing for the regulation of civil, and criminal justice, and fiscal law, altering as little as possible the existing native laws, but introducing courts of various grades, and a system of procedure; and these regulations were subsequently adopted as models by the Bombay and Madras Governments, so that at the commencement of the 19th century the laws administered in India, amongst others, were Mahommedan laws to Mahommedans. In the Mofussil it was the criminal law of the Koran as modified by regulation that was administered to Mahommedans and Hindoos. The judges in the Presidency towns were barristers sent out from England to preside in the Supreme Courts, and they administered justice within the small extent of territory comprised within their jurisdiction. Although they were required to administer

Mahommedan and Hindoo systems of law, yet that which they really did administer was the law of England. The judges of the Mofussil, or Provincial Courts were selected from amongst the writers, or civil servants, who obtained their appointments from the Directors of the East India Company, and the only knowledge of the laws which they possessed, and which they were destined to administer, was acquired whilst preparing for the few examinations which it was necessary that they should pass previous to their proceeding to India. But as to practical knowledge of the laws, with few exceptions, they had none. Prior to 1846 English barristers were not at liberty to practise in the Mofussil Courts. Their exclusion was attended with a twofold disadvantage : the knowledge of the principles of the laws could not be brought to bear upon the intelligence of the Mofussil judge, and they themselves were deprived of the inducement to study the native laws with that degree of attention which might tend to elucidate their principles. In 1855 the method of selection for the Indian Civil Service was changed, and the competitive system of examination was substituted.

But the facilities afforded since this change for the acquisition of a knowledge of the native laws by the candidates who passed the competitive examination are not even as great as those under the old East India Company's system, for, the Directors provided competent masters to instruct the students. Under the present system they are without any instructor, and are forced to derive their legal inspiration from works which have been published forty-four years ago. The competitors are detained here for two years after they pass the first examination, to complete their studies, and the *curriculum* is one that requires almost superhuman application to get through, with the desired object, which cannot certainly be a mere smattering, within the time limited. The result is, that something must be neglected, or else very superficially acquired, and it is no common thing to hear the candidates say, that they will leave the study of the native laws until the last subject, the very one of all others, that is of the first importance to them, and to the natives of India. The author has frequently been applied to by students to ascer-

tain whether the native laws of India have undergone any, and if so, what progressive development, for, they are unable to gather from works published so far back, what is the present state of the law. This is certainly a state of things that should not be. The natives of India are acute and can readily discover ignorance. If, therefore, we wish to retain our hold upon them, to secure their allegiance, and to prevent mutinies, it can only be done by proving to them that while we preserve to them their laws, and their religion, upon which their laws are founded, we respect the one and the other, and that can only be done by sending to administer their laws, judges who have made them their study.

This is a subject the importance of which it is impossible to overrate. Upon the honest, fair, impartial, and able administration of the law, no less than the patient and courteous conduct and bearing of the Judge, depends the continuance of our supremacy in India. Of the course of legal study selected for the candidates, there is less to complain than of the mode in which that study is enforced, and the sources from which inspiration is sought. The subject is worthy of a better system. The candidates are required to study Indian law, including the Penal Code, the Codes of Civil and Criminal Procedure, and the Indian Succession Act: these are British Indian laws. But they are also required to study the principles of Hindoo and Mahomedan law. With regard to the former class, the students of course obtain their information from the Acts themselves. With regard to the latter, the class books selected for study and examination were published as far back as forty-four years ago, and from these same sources are the students of the Indian Universities compelled to acquire *their* legal knowledge. That works of more recent date, bringing the law down to the present time, are imperatively demanded, there can be no doubt. We venture to hope that the present work, as well as that which we published last year on the germane subject of the Hindoo Law of Inheritance, will enable the Commissioners to remove this reproach from the system of the legal training which has been adopted for candidates for judicial offices in India. The failure to

pass the examinations with credit shows the requirement of the proper superintendence of the legal education of the candidates by a competent professor, who understands the law theoretically and practically. The Hindoo and Mahommedan modes of thought and feeling are alike new to the English mind, and in the absence of any preparation of the mind in this direction, the English student is entirely at sea when he first attempts to master native law books. Those selected place the subject in the most uninviting form. It is worse than folly, therefore, to leave a young man to his own devices, or to throw him into the hands of mere cram-mers, who themselves have but little familiarity with the subjects which they profess to teach. The objection raised to the manifestly advantageous course which we advocate is that, if a legal professor were appointed by the Indian Office, we should be falling back again upon the condemned Haileybury system. We can hardly understand how such an argument can be seriously advanced or supported. Can men learn the laws of any country by intuition, or be supposed to master Hindoo and Mahommedan law by reading Strange and Macnaghten? In our own legal university, where we are living under the law, and are therefore reasonably presumed to know something of its principles, the complaint is that the Council of Legal Education is wanting in its duties to students by reason of the paucity of professors whom they employ. But whether that be so with reference to the legal education of English law students, or not, it certainly does apply with great force to Indian law students, for, although many gentlemen come from India at great expense (and their numbers are daily increasing, a practice which the public service requires should be stimulated rather than discouraged), to study and obtain the degree of Barrister-at-law, with the intention of returning to their native land to practise their profession, there is really no provision made for teaching them the very laws they will have to aid in administering on their return home. The Indian students complain of this, and not without reason.*

* Since this has been in type, the subject has come under the consideration of the Benchers.

If the India Office and the Council of Legal Education were in accord upon this subject, there could be little difficulty in making an arrangement that would be advantageous to themselves and to the students (whether belonging to the Civil Service, or the Inns of Court) who intend practising in India, and therefore, require to know the native laws. This is especially worthy of the consideration of the Council of Legal Education, as it is not improbable that the Benchers will require Indian pupils, seeking a remission of terms, to pass an examination in law. But to return.

After the government of the country was assumed by the Crown, the Supreme Courts of the Presidency towns, and the Sudder Courts, which exercised an appellate control over the proceedings of the Mofussil Courts, were in 1862 amalgamated under the designation of the High Court, the judges of both courts continuing to hold office, and future vacancies being provided for, by the appointment of a certain number of Barristers, Indian Civilians, Uncovenanted Judges, or Vakeels. It was provided by the Charter establishing the High Court that the law and practice, as modified by subsequent enactments which prevailed in the late Sudder Courts, should apply to cases civil and criminal, coming from the Mofussil, and the law and practice of the late Supreme Courts, similarly modified, should apply to cases originating in the Presidency towns.

The law administered in India with regard to Mahommedans is that of

1. The Soonees.
2. The Sheeas.

The Charter of George II., granted in 1753, is the first instance we find of the reservation of their own laws to the natives of India. This was effected by an express exception from the jurisdiction of the Mayor's Court, of all suits and actions between the Indian natives only. Warren Hastings' plan for the administration of justice in the year 1772 by its 23rd rule especially reserved their laws to the natives. In 1780 the first regulation enacted by the Bengal Government after Parliament had invested the Governor-General and Council with that power embodied the 23rd rule, and the 27th

section enacted “that in all suits regarding inheritance, marriage, and caste, and other religious usages and institutions, the laws of the Koran with respect to the Mahommedans . . . shall be invariably adhered to.” In the revised code, which passed the following year, this section was re-enacted with the addition of the word “succession.”

In 1781, the declaratory Act of 21 Geo. III. c. 70, sec. 17, enacted, that disputes between the native inhabitants of Calcutta, touching their inheritance and succession to lands, rents, and goods, and all matters of contract, and dealing between party and party, shall be determined in the case of Mahommedans by the laws and usages of Mahommedans, and where one of the parties shall be a Mahommedan by the laws and usages of the defendant, and their laws and customs were expressly preserved to them by section 18, which enacted that “In order that regard should be had to the civil and religious usages of the said natives, the rights and authorities of fathers of families, as the same might have been exercised by the . . . Mahommedan law, shall be preserved to them within the said families.” And by section 19, the Court was empowered to frame process, and make such rules and orders for the execution thereof, in suits civil and criminal against the natives, as might accommodate the same to the religion and manners of the natives, as far as the same might consist with the due execution of the laws, and the attainment of justice. The 37 Geo. III. c. 142, extended these provisions to the Presidencies of Madras and Bombay. The 13th section added to the words of the 17th section of the 21 Geo. III. c. 70, *supra*, the following words, “Or by such laws and usages as the same would have been determined by, if the suit had been brought and the action commenced in a native court, and where one of the parties shall be a Mahommedan . . . by the laws and usages of the defendant ;* and in all suits so to be determined by the laws and usages of the natives, the said Courts shall make such rules and orders for the conduct of the same, and frame

* These regulations apply to . . . Mahommedans, not by birth only, but by religion, *Abraham v. Abraham*, 9 Moore's In. Ap., 319.

such process for the execution of their judgments, sentences, or decrees, as shall be most consonant to the 'religions and manners of the said natives, and to the said laws and usages respectively, and the easy attainment of the ends of justice, and such means shall be adopted for compelling the appearance of witnesses, and taking their examinations as shall be consistent with the said laws and usages, so that the suits shall be conducted with as much care, and at as little expense as shall be consistent with the attainment of substantial justice."

The Charters of Justice for the Supreme Courts at Madras and Bombay contained similar provisions.

And the Charters of Justice for the High Courts at the different Presidencies also contain similar provisions.

•The Legislature has ever been scrupulous in interfering with the religious prejudices, or institutions of the natives of India. There is only one instance in which they have interfered with respect to inheritance and succession, viz., in the case of apostacy, or change of religion. Formerly difference of religion excluded from inheritance, *Macn. Prin.* 6; *Bail. Inh.*, p. 25. But the Legislature, by Act XXI. of 1850, provided that so much of any law or usage now in force, within the territories subject to the government of the East India Company, as inflicts upon any person forfeiture of rights or property, or may be held in any way to impair, or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories.

The two great branches of the law which the Indian civilian and the Indian barrister will find most difficult to acquire are the Mahommedan and Hindoo. With the latter or any other branch of English law we have nothing to do. The Hindoo Law of Inheritance we have already treated at length in another work. The one now offered to the public is intended to set forth the doctrines of the Mahommedan law, being based upon the text of Macnaghten, elucidated by the

cases that have been decided by the High Courts of the several Presidencies since their establishment, and by the decisions of the Privy Council.

Before adverting to our object in undertaking the task, we shall endeavour to render as clear an account as possible of these two schools of law, and the sources from which a knowledge of these laws can be best obtained.

The civil law of the Mahommedans, like that of the Hindoos, is emphatically a religious one. It is believed to have been derived from direct revelation. The Koran, though variously interpreted, is regarded by the Mussulmans of every denomination as the fountain head, and first authority of all law, religious, civil, and criminal.

The Mahommedan law is, as we have before observed, divided into two schools, called the Soonee and the Sheer; and here let us pause, in order to make a short sketch of the origin of these two sects. On the death of the Prophet a great and irreconcilable schism broke out amongst his followers as to the right to the succession of the Khilafat. On the murder of the third Khilafa, or Ceilipha, Usman, and the elevation of Ali Muhammad's cousin, and son-in-law to the dignity of *Amir-al Muminin*, the breach became complete and final, the faithful separating themselves into two sections, afterwards known as the *Soonees* and the *Sheeas*. The former are so called from the great deference they pay to the *Soona*, or traditions of the Prophet's precepts and examples, as already explained. The term *Sheea* is applied to the rival faction, apparently in reproach, as it signifies sectary, or dissenter. These two parties being cut off from intercommunication, naturally diverged from each other in their interpretation of the law. They form, therefore, the two great schools of law, both paying equal deference to the paramount *Soonee sect*. The Soonees are by far a more numerous and influential sect than their rivals, especially in India, where they comprise the more wealthy and intelligent classes, and where their doctrines are those chiefly recognized by our Courts. Mr. Morley, in the *Digest, tit. Inheritance*, vol. i. p. 339, on the authority of Mr. Baillie, says that the general law of

the country is that of Abu Haneefa, and no other is administered in the Supreme Courts in cases of Mahomedan inheritance. In the "Introduction" to the *Digest*, p. 179, he corrects this error, referring to *Baillie (Inheritance, Preface, p. 6)*, as the originator of the error, in which it is said that no other than the Soonee law has ever been administered in the Supreme Court of Bengal. The error must be manifest, when we remember that the Charters of Justice for India require that the law of the defendant is to govern the case. The Soonees are subdivided into many sects, and four of these are generally named as the most important. They originated with certain eminent Mujtahid Imams. They are called after their founders, the celebrated sages Abu Haneefa, Malik Ben Annas, Mahommad Ash Shafiî, and Ahmed Ibn Hanbal. The tenets of the first prevail most generally throughout India, and are usually admitted by our tribunals. *Abu Haneefa's* views are distinguished by the stress he lays on the Kiyas, and the extent to which he permits the right of private judgment to be exercised. His principles have received further development and application from two eminent disciples of his—Abu Yusuf and Muhammed.

Muhammad Ash Shafiî is the only one of the four, except Abu Haneefa, whose doctrines have any currency in India, and even his only, in some places along the sea coast of the peninsula. Malik Ben Annas was characterized by an extreme respect for tradition : his tenets are not known to prevail in India. Ahmed Ibn Hanbal, by an excessive veneration for the Koran, which he maintained to be uncreated and eternal. They are not known in India.

Sources of Mahomedan law.—The Mahomedans recognize four sources of their law, viz., the Koran, the Soona and Hadis, the Ijmâa, and the Kiyâs. The Koran consists of a collection of the revelations made by Mahommed, either as he reduced them to writing himself, or communicated them orally to his followers. The collection was made by Abu Bakr, the prophet's successor, and placed in the hands of Umar's daughter, Hafsa, one of the prophet's widows.

The Soona are the precepts and example left by Mahommed himself.

The Hadis are his sayings and traditions, *i.e.*, the oral law, which is held to be second only in authority to the Koran itself.

These precepts and traditions are divided into two classes, viz., the Kads (holy), which are supposed to have been directly communicated to Mahommed by the angel Gabriel, and the Nabawi (prophetic), or those which are from the prophet's own mouth, and are not considered as inspired. Both these, however, have the force of law, and, with the Koran, constituted the whole body of the law at the time of Mahommed's death. "I leave with you," says the prophet, "two things, which, as long as you adhere thereto, will prevent you from error—these are the book of God, and my practice."

In addition to the Koran, and the oral traditions there are two other great sources of Mahommedan law, viz., the Ijmáa (concurrence) and the Kiyás (ratiocination). The Ijmáa is composed of the decisions of Mahommed (Sahábah), the disciples of his companions (Tábiûún), and the pupils of these disciples; these decisions are said to have been unanimous on each point, and are next in authority to the Koran and Soona, or Hadis.

Both the Soona and the Ijmáa were originally preserved by tradition, and were transmitted through successive generations, by learned men, who made the study of the Koran and the traditions, and their memorial preservation an especial object. These learned men were called Hafiz* (preserver), and in communicating their narratives to their disciples they invariably mentioned, as a kind of preface, the series of persons through whom they had successively passed, before they came into their possession. This preface is called the Isnád (support), and according to the credibility attached to the narrators whose names are enumerated as the Isnáds, depends

* This appellation is given to any one who knows the Koran by heart, but it is more particularly used by the Soonee writers to designate those who have committed to memory the six great collections of traditions, and who can cite the Isnuds with discrimination, *Morley's Dig. Intro.*, ccxxviii.

the authenticity and authority of the tradition related ; some sects absolutely rejecting traditions which are received as authoritative by others. The Isnáds were retained in the books after the Soona and Ijmáa had become reduced to writing, and collected together in the works hereafter noticed.

The Kiyás, which is the fourth source of the Mahommedan law, consists of analogical deductions derived from a comparison of the Koran, the Soona and the Ijmáa, when these do not apply either collectively or individually to any particular case. This exercise of private judgment is allowed with a greater or less extension of limit by the different Mahommedan sects ; some, however, refusing its authority altogether.

• It appears, then, that, although the sources of the law are the same throughout the Mahommedan world, there is a variety in the manner of their reception, and in the laws derived from them, accordingly as they are applied to the different sects.

Of these four chief sects of the Soonees the followers of Málik and Ibn Hanbal may be considered as the most rigid, those of Ash Shafiî as holding doctrines most conformable to the spirit of Islam, and Abu Haneefa as containing the mildest, and most philosophical tenets of all.

The second great Mahommedan sect, the Sheeas, upheld the supremacy of Ali Ben Abí Talib, the first convert to Islam, the cousin and son-in-law of Mahommed. The Sheeas assert that Ali was the only lawful successor of the Prophet. The Sheeas are divided into five principal sects, and these are again subdivided into other classes. Although differing in points of faith and religious doctrine, the Sheea sects, with few trifling exceptions, never hold any variety of opinion in matters of law. These are the chief sects of the Mahommedans, who differ in opinion with regard to legal doctrine. The Koran is received as an universal authority. It is in the interpretation of it that the divergence commences, and this differs according to the views of the different commentators of the various sects,—the Sheeas, more particularly, rendering the meaning of many texts

in a manner totally opposed to their acceptation by the Soonees.

The traditions and the Ijmáa are also looked upon by all Mussulmans as authorities in the second degree, but their value depends upon their Isnáds. It is an error to suppose that the Sheeas reject entirely the authority of tradition, for they admit the legality of the Soona when verified by any of the twelve Imáms; and all equally venerate the precepts and examples of the Prophet and the twelve Imáms themselves, and the traditions that have been handed down by the princes and partizans of Ali, rejecting only such portions of the Soona as have been derived from persons contaminated by crime, or disobedience to God. In the latter class they range all the traditions recorded on the authority of the three first Khalífahs and of such of the companions—the Tábiûn and their disciples—as were not included amongst the supporters of Ali Ben Abi Talíb. When therefore it is asserted that the Sheeas reject the authority of tradition, it must only be understood to mean that they pay no regard to the Soonee sects, holding their names in abhorrence. What has been said with regard to the traditions as received by the Sheeas, applies equally to the Ijmáa, the authority of which depends upon the source from which it is derived.

The Kiyás is variously received by the different sects. Mr. Morley, from whose Introduction to Mahommedan Law we have been quoting, classifies the law-books of the Mussulmans, so far as they apply in India, into six great divisions, viz.:—

1. The Koran itself and the Tafsirs, or commentaries, which serve to interpret and illustrate the difficult passages and to expound the meaning of the sacred text.

2. The works which treat of traditions and the commentaries thereon.

3. The general treatises on the fundamental principles of law, spiritual and temporal, and practical jurisprudence, together with the digests of general or special law, and their commentaries.

4. The separate treatises on the law of inheritance, or

Ilm-al-áiz-Furaiz, a branch of the Ilm-al-Fikh, which exist in considerable numbers, although the subject is almost always included in the general treatises.

5. The books of decisions comprised by the Mussulman lawyers under the Ilm-al-Fatáwa, or science of decisions, which is also a branch of the Ilm-al-Fikh. These consist simply of the recital of the decisions of eminent lawyers in particular cases, and form a body of precedent, having various authority, and serving for the guidance of lawyers in subsequent decisions, much in the same manner as our reports of decided cases in England.

6. Original works on the subject by Europeans.

It would be tedious in a practical work of this nature, and would not be attended with any advantage commensurate with the space occupied, to enumerate the numerous works that have been written upon Mahommedan law. There is a long catalogue of them in the Introduction to Morley's Digest. For our present purpose we shall refer to those only which are of most frequent reference in our courts in India.

I. Of the Commentaries, or Tafsirs, on the Koran, the most famous amongst the Soonees are the Kush-Shaf, by Abu-al-Kasim and the Anwár-at-Tanzíl, by Násir ad-Din Âbd-Allah. Both these works are of almost universal authority amongst the Soonees. The Tafsir-al-Ghazálá, entitled Yákut-at-Táwíl, and the Durr-al-Mansúr of Jalál ad-Din, are also of repute amongst the Soonees.

Amongst the Sheeas is the Commentary of Abú Jaafar at-Túsí, commonly called the Tafsí at-Tusi, entitled by its author, Mujmia-al-Bayanli Ūlúm al-Koran, by the same author; but the most famous of the Sheea Tafsirs is that by Kamal-ad-Din, known as the Tafsir-i-Husaini.

II. The chief authorities in matters of tradition amongst the Soonees are the books known by the name of the six Sahihs, or six books of the Soona; whilst the Sheeas have their own four books of *Hadis*, which are venerated and esteemed by them above all others on the same subject. Two of these, known as the Sahih-al-Bukkari, and the Sahih Muslim, are the most celebrated amongst the Soonees, and are quoted together under the name of *Sahihain*, or two Sahihs.

The third collection of traditions is the *Jámia-wa al-Ilal*.

The fourth book of the *Soona* was written by Abu-Dáwúd.

A fifth was written by Abu Abd, entitled *Al-Mujtaba*.

The *Kitab as-Susan*, called *Susan Ibn Májah*, by Abu Aba Allah, is the sixth book of the *Soona*.

These six books are generally known by the name of *Al-Kutub as-Sittat fí al-Hadis*, or the six books on the traditions. The first two are denoted *Sahihain*, or the two authentic collections. The remaining four are called *Al-Kutub al-Arbaa*, or the four books. There are other collections of traditions of more or less authority, according to the reputations of their authors. They are enumerated by Mr. Morley.

The *Ilm Al Hadis* has occupied the attention of many Sheea writers from an early period. But it is stated that the Sheeas of India consider four later works as the most authentic; these are called the *Kutub-i-Arbaa*, and are, as it seems, held by them in the same estimation as the six *Sahihs* amongst the Soonees.

The first two in order of these four works are the *Tahzíb al-Ahkam* and the *Istibsár*.

The third is the *Jamia al Kafi*, by Mahommed Ben. This work is of the highest authority in India. It comprises thirty books, and is said to have occupied its author twenty years in its composition.

The fourth is the *Man la Yazashu al-Fakih*, by Abu Jaafar. It is of great note in India.

There are numerous other writers of more or less note on the Sheea Hadis referred to by Mr. Morley.

III. The Digest and Special Treatises, and their Commentaries, are extremely numerous. We can do little more than refer to them.

The general respect paid by the Soonees to the six *Sahihs* is not paid to the class of legal works now under consideration, each sect holding separate doctrines, and referring to distinct authorities. The doctrines of Abu Haneefa are those that prevail amongst the Soonee sect in India. His principal work is entitled *Fikh-al-akbar*, it treats of the *Ilm al-Kalám*. His doctrines are sometimes qualified by his two

famous disciples and pupils. Sir W. Jones says, “that although Abu Haneefa be the acknowledged head of the prevailing sect, and has given his name to it, yet so great veneration is shown for Abu Yusuf and the lawyer Mahommed, that when they both dissent from their master, the Musulman judge is at liberty to adopt either of the two decisions which may seem to him the more consonant to reason, and founded on the better authority.” And where the two disciples differ from their master and from each other, the authority of Abu Yusuf, particularly in judicial matters, is to be preferred to that of Mahommed, but when one of them agrees with Abu Haneefa, then his opinion prevails. Without stopping to refer to the several legal works of Abu Yusuf and Imam Mahommed and their commentators, we come to the *Hedayah*, which is the most celebrated Digest, or law treatise according to the doctrines of Abu Haneefa and his disciples, Abu Yusuf and Imam Mahommed, which exists in India. It has been declared that this work has superseded all previous books on the law, and that all persons should remember the rules prescribed in it, and that it should be followed as a guide through “life.” It was translated by Mr. Hamilton at the request of Sir W. Jones. It omits altogether the Law of Inheritance, a most important subject. There are many glosses upon it. Those most conspicuous for their reputation in India are the *Niháyah*, the *Înáyah*, the *Kifáyah*, and the *Fath al-Kadír*. The first supplies the omission of the Law of Inheritance in the *Hedayah*, although it is not regarded as of equal authority with the *Furáiz as-Sirajiyyah*. The *Inayah* is much esteemed for its careful analysis and interpretation of the text. The *Kifáyah*, besides the author’s own observations, gives concisely the substance of other commentaries. The *Fath al-Kadir* is the most comprehensive of all the comments on the *Hedayah*, and includes a collection of decisions which render it extremely useful.

The *Nanz Ad-Dakáik* is a book of great reputation, principally derived from the *Wafí*, and containing questions and decisions according to the doctrines of Abu Haneefa, Abu Yusuf, and Imam Mahommed, Zufar, Ash Shâfi, Malik,

and others. The Talyin Al-Hakáik is also in great repute in India on account of its holding the doctrines of the Haneefa sect against those of the followers of Ash Sháfi. There are other commentaries and elementary treatises, for the enumeration of which we have not space, but they will be found in Mr. Morley's Introduction. That learned writer says :—
 “These are the principal law books of the third class that are known, and are of authority amongst the Soonees of the Haneefa sect in India, but, as may be imagined, there are only a few of those quoted in the Courts, the Hedayah and its comments, illustrated by the books of Fatawa, generally sufficing to satisfy the judges, and to offer sufficient grounds on which to base a decision.”

The Sheea works of the third class are perhaps not so numerous, in proportion to those of the Soonees, as are their works on the traditions, the writers of the Sheea sect having expended more labour upon theological controversy, and that portion of the law immediately connected with the doctrine of their faith, and their religious observances, than upon those branches which treat of civil and criminal jurisprudence. The most famous of this class of works are the treatises entitled the Jamia al-Kabír; the Kibáb ash-Sheráia by Abu al-Hasan. This writer is looked upon as a high authority, although his fame has been eclipsed by his more celebrated son, Abú Jaafar Mahommed. When these two writers are quoted they are called the two Saduks. The best known of the law books of the present class, composed by Abú Jaafar, is the Maknaa fi al-Fikh. Passing over other writers of some note, we come to Shaikh Muayyid, the most generally known of all the Sheea lawyers. His great work, the Sharája al-Islám, is more universally referred to than any other Sheea law book, and is the chief authority for the law of the Indian followers of Ali. A valuable and voluminous commentary on this work, called Masálik al-Afham, was written by Zain ad-Din Áli As-Sáilî, commonly called the Second Sahíd. The Jamia Ash-Sheráia and the Mudkhal dar Usul-i Fikh, by Yahya Ben Ahmad al-Hilli, are in the greatest repute.

The Shaikh al-Allamah is called the chief of the lawyers

of Hillah, nor is his name second to any other as a writer of the present class of Sheea law books, his legal works being very numerous and frequently referred to as authorities of undisputed merit. The most famous are the Talkhis al-Mirám, the Gáyat al-Ahkám, and the Tahír Ahkám, which last is a justly celebrated work. The Mukhtaluf Ash-Sheea is also a well-known composition of this great lawyer, and his Irshad al-Azhán is constantly quoted as an authority under the name of Irshád i-Állámah.

The Jamia i-Ábbási is a concise and comprehensive treatise on Sheea law in twenty books.

There are two more modern Sheea works of the present class, which are deserving of notice; the Mufátih, by Mahommed Ben Murtaza, surnamed Muhsan, and a commentary on that work by his nephew of the same name, but surnamed Hádí. The Mukhtasar-i-Náfia is a Sheea law treatise, very frequently quoted, but its author's name is not known.

A general digest of the Imameeeyah law in temporal matters was compiled under the superintendence of Sir W. Jones, the text of which is still in MS.; a portion of it was translated by Colonel Baillie.

IV. The works which treat separately and especially of the Ilm al-Furaiz, or science of dividing inheritances are not numerous in India, the Sirajiyyah and its commentary, the Shurafceah, being almost the only works on the subject referred to by the lawyers of the Haneefí school.

Zaid Ben Sabit is the earliest authority on the Ilm al-Furaiz, and may be called the father of the Law of Inheritance. Mahommed is reported to have said to his followers, "the most learned amongst you in the laws of heritage is Zaid," and the Kalífahs Omar and Othman considered him without an equal as a judge, a jurisconsult, a calculator in the division of inheritance, and a reader of the Koran.

But the highest authority on the Law of Inheritance amongst the Soonees of India is the Sirajiyyah, which is sometimes called the Furaiz as-Sajáwandí. This work has been commented upon by upwards of forty writers, the most

celebrated of these, and the one most generally employed to explain the text is the Shurafeeah. Persian translations of the Sirajiyyah, and of the Shurafeeah were made by order of Warren Hastings, in pursuance of his plan for rendering the native laws accessible to those to whom the administration of justice was entrusted. This work and an abstract of the Shurafeeah, was translated by Sir W. Jones. Mr. Morley says, ‘Mr. Neill Baillie has well observed of Sir W. Jones’ translation, The Sirajiyyah is very brief and abstruse, and without the aid of a commentary, or living teacher to unfold and illustrate its meaning, can with difficulty be understood even by Arabic scholars. It is therefore not a matter of surprise that its translation by Sir W. Jones should be almost unknown to English lawyers, and be, perhaps, never referred to in Her Majesty’s Supreme Courts of Judicature in India. With the assistance of the Shurafeca, it is brought within the reach of the most ordinary capacity, and if the abstract translation of that commentary, for which we are also indebted to Sir W. Jones, had been more copious, nothing further would have been requisite to give the English reader a complete view of this excellent system of jurisprudence. Mr. Baillie himself subsequently supplied this *desideratum*, by his admirable treatise on the Law of Mahommedan Inheritance.’

The earliest treatises on the *Īlm al-Furaiz* by Sheea writers appear to have come from the pen of Abd al-Aziz Ben Ahmed and Abu Mahommed al-Kindi, the best known and most esteemed are the *Ihtijaj ash-shiah*, the *Kitab al-Mawaris*, the *Hamal al-Furaiz* and the *Furaiz ash-Shariyah*. Abu Jaafar Mahommed at-Tusi has left a work on inheritance entitled *Al-Ījaz fi al-Furaiz*.

V. The last class of native works to be noticed are those which treat of the *Īlm al-Fatawa*, or science of decisions. They are very numerous, amounting to several hundred; the greater portion are unknown, or never used in India. Mr. Morley says, “Almost all these collections have the title of *Fatāwa*, but some appear under other designations; some give the decisions of particular lawyers, or those found in particular books; others those which tend to illustrate

the doctrines of the several sects, whilst others again are devoted to recording the opinions of learned jurists who were natives, or residents of certain places, or lived at certain times." It is unnecessary to refer to them here. They are enumerated in Morley.

Of the collections of decisions now known in India none is so frequently referred to as the *Fatáwa al-Alumgeeree*. Although the *Fatáwa Kazi Khan* is considered of equal authority with the *Hedayah* it is neither so generally used, nor so publicly diffused as the *Fatawa Alumgeeree*. The latter work, from its comprehensive nature, is applicable in almost every case that arises involving points of Haneefa law, and is on that account produced, and quoted as an authority almost every day in India. It contains a bare recital of law cases without any arguments, or proofs, an omission which renders it defective for elementary instruction. The immense number of cases, however, compensate in some measure for this want.

Mr. Neill Baillie has recently published a translation of selected portions of two books of the *Fatawa Alumgeeree* that comprises the whole subject of sale.

The *Fatáwa al-Ankirawí* is after the doctrines of Abu Haneefa, and is a work of great authority.

The *Fatawa Hammadíyah* is also of considerable authority.

The *Fatáwa as-Sirajíyyah* is referred to by Mr. Baillie in his work on Inheritance as an authority.

There are also several collections of decisions after the doctrine of Ash-Shafi.

VI. Several Europeans have written works of authority on the subject of Mahomedan law. Sir W. H. Macraghten, of the Bengal Civil Service, whose work forms the basis of this publication, was the first English writer who published an original treatise on the subject of Mahomedan law. His work is entitled "*Principles and Precedents of Mahomedan Law*." No work was ever presented to the public with greater diffidence, no work has ever attained a higher character for accuracy. The learned editor of the Second Edition, Mr. Sloan, of the Madras Bar, an indefatigable and successful labourer in the

same field, observes: "The author could scarcely have anticipated, when presenting it to the judicial service, that almost from the very day of its publication, it would have been considered the safest guide in the administration of Mahomedan law and an indisputable authority, both for the Crown and Mofussil courts. The accuracy of its doctrine has been established by the concurrent testimony of innumerable Fatawas delivered by Mouftees and 'Cauzies, whose lives have been exclusively devoted to the study of this particular law, and such has been the success attending the production, that after a test of years before every court in India, as well as before Her Majesty's Privy Council, not a single precedent has ever been questioned, nor a single conclusion over-ruled." Without going to this extent, *see* p. 40, *et seq.*, we may observe that although it is forty-four years since the work was published, it is the only one, and perhaps for the best of all reasons, viz. that there was no other which has been placed by the Civil Commissioners in the hands of students for the Civil Service in India. The precedents are of the greatest importance. Some writers do not consider them so. *Mr. Baillie, Deg. M.L.* xxii., says, they are not the decisions of Courts of Justice, but Fatawa or opinions of their law officers, delivered in answer to questions proposed to them by the judges. They cannot, therefore, be properly said to be precedents in the same authoritative sense in which the word is applied to decisions in courts of justice in England. The author himself has treated them rather as illustrations of his "principles," which he has adduced from higher authority The late Mr. Wilson, taking the like view of them, has omitted them altogether in a recent edition of the "Principles." This is certainly not the view that Macnaghten took of them, for he distinctly says in his preliminary remarks, "The precedents consist of legal expositions which *have been actually delivered in the several Courts of Justice*. I have selected such as appeared to me of the greatest importance, and those which seemed to embrace doctrinal points most likely to arise none have been admitted but such as appeared to me to admit of no doubt as to their accuracy." But whatever may have been Mr. Wilson's reasons for

omitting them from his edition, or the opinions of other learned writers as to their judicial authority, we have exercised our own judgment in their favour by using them as illustrations of the principles which their author intended them to elucidate, and we have done so advisedly, for it is our opinion that the chief value of a work intended for the student consists in the number and variety of its illustrations. They not only save most valuable time in searching for examples which a student, unacquainted with the principles of the law, is frequently unable to find ; but they also impress the memory in a more lasting form than any other mode of teaching. We all know how easily the principle is grasped when the example is put. It is true that the student could refer to the precedents for himself under Macnaghten's arrangement ; but it is conceived that the mode adopted in the present work of placing the precedent immediately after the principle by way of illustration, will save much valuable time, and will render the principle more intelligible.

Macnaghten's Principles and Precedents has now so long stood the test of judicial scrutiny and investigation that it meets the highest respect as a text-book and an authority ; and no work upon the subject that did not largely draw from its source of inspiration would meet with much favour with the Indian public : the greatest Mahomedan lawyers pay as much deference to it as English lawyers, we have therefore selected it as the basis of the present compilation.

A very useful manual has been based upon its principles by M. Sadagopah Charloo, of the Madras Sudder Bar ; but it contains no illustrations, and does not profess to include the cases that have been reported since Macnaghten's work was published.

Professor Wilson's is a mere reprint of the principles without the precedents.

In 1832, Mr. Neill Baillie published a very valuable treatise on the law of inheritance, founded on the *Sirajiyyah* and its commentary, the *Shureefeea*, which are standard Arabic works on the Soonee system of the law of inherit-

ance. Abridged translations of these two works are to be found amongst Sir W. Jones's works. Speaking of the *Sirajiyah* Macnaghten says: "I am strongly disposed to believe that no possible question could occur on the Mahomedan law of succession which might not be correctly and easily answered by this work."

Mr. Baillie has also published the law of sale, based upon the *Fatawa Alumgeeree*. He describes it as a "faithful transcript" of the original.

Elberling's treatise is a compendium of inheritance, gift, will, sale, and mortgage, and possesses great merit.

We have already commented upon the *Hedayah*, or *Guide*. It was translated by Mr. Hamilton, under the directions of Warren Hastings. The translation is contained in four thick quarto volumes, but is rarely met with. "

In 1865, Mr. Baillie also published a very valuable digest of Mahomedan law, upon the subjects of marriage, fosterage, divorce, slavery, parentage, maintenance, pre-emption, gift, appropriation, wills, inheritance, claims, and judicial proceedings.

In 1865, Mr. Almaric Rumsey published a chart of family inheritance according to the orthodox Mahomedan law, with an explanatory treatise. One of the features in this little work is to show that the numerous problems which have hitherto been worked by obsolete and clumsy methods will all readily yield to the power of European arithmetic. We have already stated our reasons for not adopting this system.

These are all the legal works that have been written by Europeans on the civil law of the Soonee sect. A general digest of the *Imameeyah*, or Sheea law, was compiled under the superintendence of Sir W. Jones. The translation of this work was placed in the hands of Col. Baillie, who only completed the first part of it, leaving the remainder unfinished. This, and a few stray notes in other works, are the only means of obtaining a knowledge of the Sheea law that the English student possesses.

The authoritative character of Macnaghten's work has no doubt induced the Commissioners of the Civil Service to

select it as a class-book for the candidates for that service ; but as it was published upwards of forty-four years ago it is submitted that the time has arrived for a new work. We have based the present work upon the text of Macnaghten's *Principles and Precedents* because no work would be received by the public that did not recognize an authority of such deserved celebrity. We have, however, recast it, and framed it upon the model of our English law books. We have incorporated in it all the decisions of the Privy Council, and of the High Courts of the several Presidencies in India. We have not aimed at the production of a philosophical work, but of a purely practical one, capable of supplying a want which has been long felt by students, who have not found Macnaghten's arrangement as simple and practical as it might have been. We have endeavoured to enforce the principles not only from Macnaghten's Precedents but from other text writers ; illustrating them wherever practicable, by the decisions of the Lords Commissioners of Her Majesty's Privy Council, and of the High Courts of the several Presidencies since their establishment. We have preferred taking the law from that period, as these courts have been presided over by barristers of legal training and judicial habits, and we may regard their decisions as establishing a current of authorities which may be treated as precedents. Although the decisions of the Sudder Courts have not been altogether excluded they have been sparingly cited, because they cannot have the same judicial weight which the decisions of the High Court possess, for the reason that the former were presided over, with few exceptions, by judges who had not the advantage of legal education and training.

The work comprises the Law of Inheritance as applicable to the Soonee sect, with a concise chapter on the chief points on which the Sheea sect differs from them. It also contains short chapters including the leading features of the law of contracts, sale, debt, pre-emption, gifts during life, bequests, endowments ; the relations of life, marriage, dower, divorce, parentage, minority, guardianship.

The author ventures to hope that he has attained the

object he had in view in preparing this work, and that it will be found an useful companion to his work on the Hindoo Law of Inheritance, which he is gratified to find has been appreciated by his pupils. He is not without hope, also, that as the work comprises the decisions of the High Courts of each of the Presidencies, and of the Privy Council upon questions of Mahommedan law, it will be found of practical utility to the Judicial Bench, and the legal practitioner.

The author regrets that he has not been able to obtain the reports of the North-Western Provinces.

THE AUTHOR.

5, ESSEX COURT, TEMPLE,
25th March, 1869.

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LIST OF ABBREVIATIONS.

Bail. Dig. M. L.	Baillie's Digest of Mahomedan Law
Bail. In.	Baillie on Inheritance
Bail. Mahom. Law of Sale Intro.	Baillie's Mahomedan Law of Sale, Introduction
Beng. L. R. Ass. Side Civil.	Bengal Law Report Ass. Side Civil
Beng. L. R. Orig. Civ. Side.	Bengal Law Reports, Original, Civil Side
Beng. L. R.	Bengal Law Reports
Bl. Com.	Blackstone's Commentaries
Borr. Rep. Bomb. S. A.	Borrodaille's Reports, Bombay, Special Appeal
Dec. S. D. A. N. W. P.	Decree Sudder Dewany Adawlut, North Western Provinces
East's N. of Cas. Sup. Court, Cal.	East's Notes of Cases, Supreme Court, Calcutta
Elb.	Elberling
Fulton R. Sup. Ct. Cal.	Fulton's Reports of the Supreme Court of Calcutta
Fulton R. S. C. Cal.	Fulton's Reports, Supreme Court, Calcutta
Gra. H. L. of Inh.	Grady, on the Hindoo Law of Inheritance
Hed.	Hedaya
Hed. App.	Hedaya, Appendix
H. C. Rep. Bomb.	High Court Reports, Bombay
Kor.	Koran
Macn. Prin. G. R.	Macnaghten's Principles of Mahomedan Law, General Rules
Macn. Prin. and Prec. M. L	Macnaghten's Principles and Precedents of Mahomedan Law
Macn. Prec.	Macnaghten's Precedents of Mahomedan Law
Macn. Prin.	Macnaghten's Principles of Mahomedan Law
Macph. Intro. to Law of Mortgage	Macpherson's Introduction to the Law of Mortgage
Mad. Dec.	Madras Decrees
Mad. H. C. R.	Madras High Court Reports
Mad. Jur.	Madras Jurist
M. L. I.	Baillie's Mahomedan Law, Inheritance
Marsh. Rep.	Marshall's Reports, Calcutta
Moore's In. Ap.	Moore's Indian Appeal, Privy Council
Morl.	Morley's Digest
Prelim. Rem.	Macnaghten's Preliminary Remarks
Prin. of Dis.	Principles of Distribution
Prin. Vest. Inh.	Principles of Vested Inheritance
P. C.	Privy Council
Rev. Civ. and Cr. Rep.	Revenue, Civil, and Criminal Reporter, Calcutta
Rum.	Rumsay's Chart of Mahomedan Inheritance
Sad. Ch. Man. Civ. L.	Sadagopah Charlonws Manual of Civil Law
Sev. Cas.	Sevtre's Cases
Sil. Rep. Bomb.	Silvester's Reports, Bombay
Shur.	Shureefeea
Siraj.	Sirajiyzah
Siraj. Com.	Sirajiyzah Commentary, by Jones
Sloan. Jud. and Land Rev. Co.	Sloan's Judicial and Land Revenue Code
Sl. Ed. of Macn.	Sloan's Edition of Macnaghten's Principles and Precedents
S. A. Dec. in A.	Special Appeal Decree in Appeal
S. A.	Special Appeal
Stra. Man. H. L.	Strange's Manual of Hindoo Law
S. D. A. Beng.	Sudder Dewany Adawlut, Bengal
S. U. Pro.	Sudder Udawlut
W. R. Pr. Co. Cal.	Weekly Reporter, Privy Council, Calcutta
W. R. Civ. Rul. Cal.	Weekly Reporter, Civil Rulings, Calcutta

A MANUAL OF MAHOMMEDAN LAW.

BOOK I.

CHAPTER I.

SECTION I.

INHERITANCE, OR FURAIZ.

Definition—All kinds of property inheritable alike—Sources of inheritance: 1, By consanguinity; 2, By marriage; 3, By Wulla—Bases of the law of inheritance—Charges upon the inheritance: 1, Funeral expenses; 2, Debts—Debts not immediately payable become so on death; 3, Legacies—Heirs—Legatees, how far preferred to heirs.

Definition.—The Arabic term for Inheritance is Furaiz, which is the plural of fureezut, a derivative from furz, which means, “appointment, precision, explanation,” and is applied in law to anything that is established by precise and conclusive evidence. Mr. Neill Baillie, in his “Digest of Mahomedan Law,” p. 683, says, “This branch of law is termed furaiz, because the *Siham*, or shares, in a deceased person’s property, have been expressly appointed or ordained, and are based, or established on precise and conclusive evidence, so that there is an agreement between the ordinary and legal acceptations of the word.” •

All Kinds of Property Inheritable.—In the Mahomedan law of inheritance, there is no distinction between real, and personal; and between ancestral and self-acquired property, *Macn. Prin.* G. R. 1, *Prec.* 84, Cases ii. iii.; *Sirajiyyah*, by Jones, x. p. 57. Mahommed says, that if a man leave either property, or rights, they shall go to his heirs; and Sharif

adds, that an heir succeeds to his ancestor's estate with an absolute right of ownership, right of possession, and power of alienation, *Sirajiyah*, xi.

Additions made to the joint estate by the managing member of a Mahomedan family, will be presumed, in the absence of proof, to have been made from the joint estate, and will be for the benefit of all the members of the family entitled to share, *Vélai Mira Ravuttan v. Mira Moidin Ravuttan*. 2 *Mad. H. C. R.* 414.

The Sources of Inheritance.—The right of inheritance proceeds from three different sources :—

1. *By Consanguinity.*—It accrues by consanguinity, *Nusub*, which is *Kurabut*, or 'kindred.

2. *By Marriage.*—By virtue of marriage, that is, a valid marriage, which is special cause.

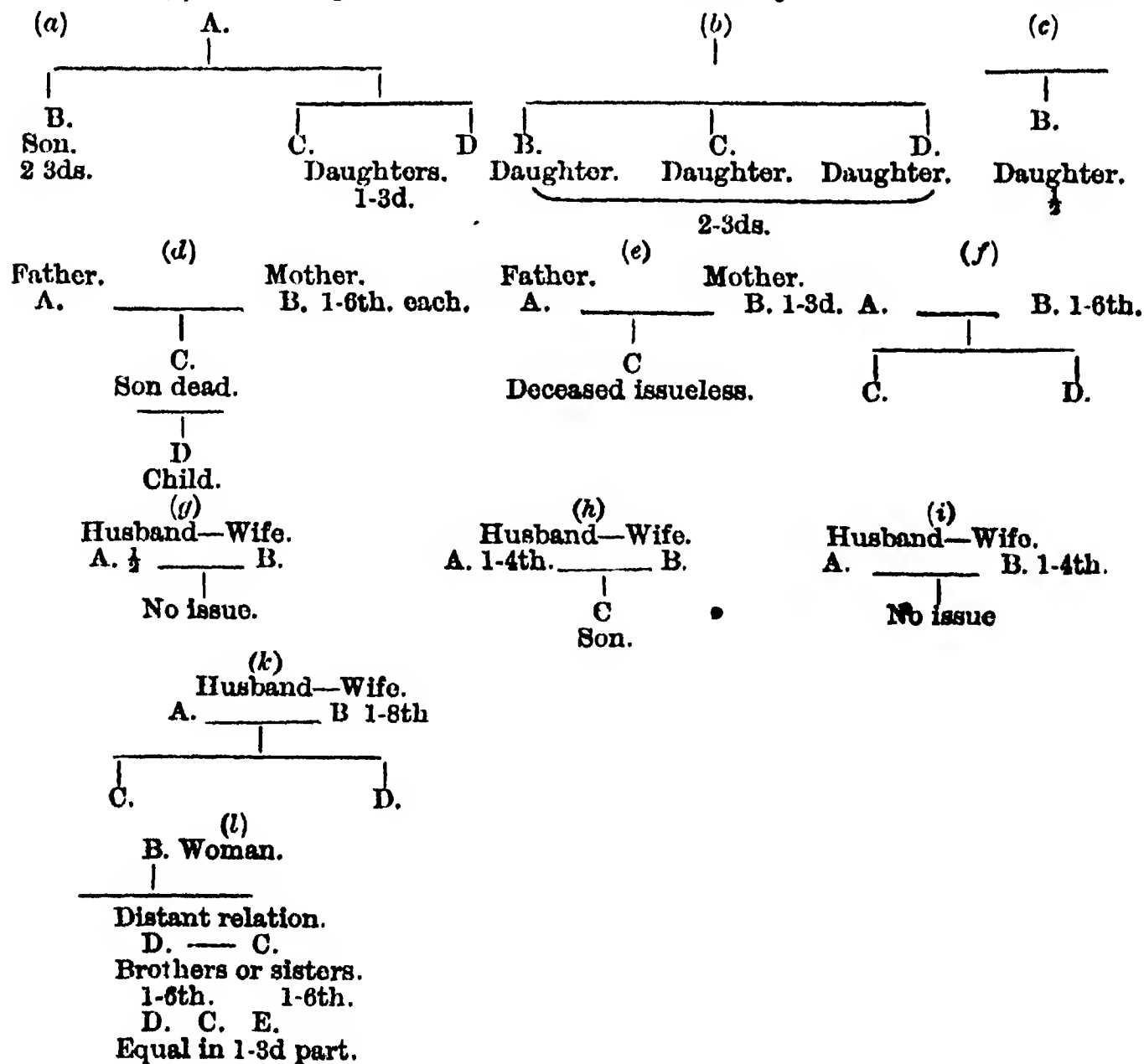
3. *By Wula.*—By virtue of *Wula*.*

Wula is of two kinds—*Wula* of emancipation, and *Wula* of *Moowalat*, or mutual friendship; the superior being the heir to the inferior in both kinds, and not the inferior to the superior, unless when there is a special condition, as when he has said, "If I die, my property is an inheritance to these," when the inferior would be heir to the superior, *Baillie, Dig. of M. L.* 684.

The Bases of the Law of Inheritance.—The provisions of the Mahomedan law of inheritance have for their bases the following passages of the Koran :—"God hath thus commanded you concerning your children. A male shall have as much as two females (*a*); but if they be females only, and above two in number, they shall have two third parts of what the deceased shall leave (*b*); and if there be but one, she shall have the half (*c*); and the parents of the deceased shall have each of them a sixth part of what he shall leave if he have a child (*d*). But if he have no child, and his parents be his heirs, then his mother shall have the third part (*e*); and if he

* Mr. Hamilton, in his translation of the "*Hedaya*," observes that there is no single word in the English language fully expressive of this term. The strictest definition of it, is, the relation between the master (or patron) and his freed man. Had he proceeded to state, "and the relation between two persons who had made a reciprocal testamentary contract," the definition might have been more complete.—*Macn. Pr. & Prec. M. L.*, p. 34.

have brethren, his mother shall have a sixth part, after the legacies which he shall bequeath and his debts be paid (*f*). *Ye know not whether your parents or your children be of greater use unto you.* This is an ordinance from God, and God is knowing and wise. Moreover, ye may claim half of what your wives shall leave, if they have no issue (*g*); but if they have issue, then ye shall have the fourth part of what they shall leave, after the legacies which they shall bequeath and the debts be paid (*h*); they also shall have the fourth part of what ye shall leave in case ye have no issue (*i*); but if ye have issue, then they shall have the eighth part of what ye shall leave, after the legacies which ye shall bequeath and your debts be paid (*k*); and if a man's or woman's substance be inherited by a distant relation, and he or she have a brother or sister, each of them two shall have a sixth part of the estate; but if there be more than this number, they shall all be equal sharers in a third part, after payment of the legacies which shall be bequeathed, and the debts, without prejudice to the heirs (*l*). They will consult thee for thy decision in certain



cases : say unto them, God giveth you these determinations concerning the more remote degrees of kindred : If a man die without issue, and have a sister, she shall have half of what he shall have, and he shall be heir to her in case she have no issue ; but if there be two sisters, they shall have between them two third parts of what he shall leave ; and if there be several, both brothers and sisters, a male shall have as much as the portion of two females.”—*Sales, Koran*, p. 127 ; *Macn. Prin. of M. L., Prelim. Remarks*, p. iii.

Charges upon the Inheritance.—The estate of a deceased person is liable to three classes of claimants before the heirs are entitled to the distribution of the inheritance—viz., 1, undertakers, for funeral expenses ; 2, debtors ; and 3, legatees, as far as one-third of the residue, and the remaining two-thirds, with so much of the other third as is not absorbed by legacies, are the patrimony of his heirs.—*Siraj*. 1.

1. *Funeral expenses.*—The first payment to be made out of the estate is that for the funeral, which includes washing, shrouding, and interment, suitable to the condition of deceased. All the property of the deceased is liable to this obligation, even before debts ; and although the property is inadequate to both purposes, with the exception, however, of such debts as have been made upon particular property, as a pledge, for instance, to which the pledgee has a preferable right.—*Baillie Dig. M. L.* 683 ; *Siraj*. 1.

2. *Debts* are next to be paid. (*See post*, “ Debts.”)

Every description of debt takes precedence of legacies and the claims of heirs. But debts acknowledged on death-bed are postponed to all others, unless they appear to have been incurred for known, and sufficient reasons (*see post*, “ Bequest”). All other debts are on an equal footing ; no creditor is preferred to another. All receive the full amount of their debts, unless the property is insufficient, in which case they are paid *pro rata*—*Shureefeea*. (*See post*, “ Debts.”)

Debts not immediately payable become so on Death.—Debts not due on the testator’s death, become payable immediately on that event happening, because the privilege of postponement is a personal right of the debtor, which dies with him ; but the death of the creditor has not the

same effect, for the person to whom the right of postponement belongs is still alive, *Bail. Inh.* 2.

3. *Legacies*.—Legacies are next to be paid out of a third of what remains after payment of funeral expenses and debts, unless the heirs allow them beyond a third. (*See post*, “Bequest.”)

Heirs.—Then the residue is to be divided amongst the heirs.

The legatee, however, has preference over the heir only when the legacy is of something specific; for if it be a confused legacy, as the bequest of a third or a fourth, it has no right of preference; nay, the legatee in that kind of legacy is a partner with the heirs, and his interest rises or falls with any increase, or diminution of the testator's estate, *Bail. Dig. M. L.* 684.

Legatees, how far preferred to Heirs.—Mr. Baillie (*Inh.* p. 2) says, “A dispute for priority can scarcely arise between heirs and legatees whose interests attach to different portions of the estate; but if such a case should occur, the author of the *Shureefecca* observes, that the legatee would be entitled to the preference, as far as a third of the property (*App.* 404); thus, if the legacy were a third of the testator's *dirhems*, or his goats, and two-thirds of them should happen to perish, leaving the remaining third still within a third of his whole estate, the legatee would be entitled to it, *Hedaya, App.* No. 10.

“It is only, however, when the articles out of which the legacy is to be paid are homogeneous, as money, goats, and generally such commodities as are estimable by weight, or measurement of capacity, that the precedence of the legatee to the heirs can be of any avail to him; for if the articles be of different kinds, as, for instance, a bequest of a third of the testator's apparel, the apparel being of various descriptions, the legatee would be entitled to no more than a third part of the remainder, in the case of loss, even though the whole of the remainder should still fall within a third of the general estate, *Hedaya, App.* No. 11, *Transl.* vol. iv. p. 490.”

SECTION II.

OF EXCLUSION FROM, AND PARTIAL SURRENDER OF
INHERITANCE.

Two descriptions of exclusion—Four causes of exclusion—Slavery—Difference of religion—Difference of allegiance—Homicide—Insanity and blindness—Effect of disqualification—Heirs not liable to exclusion—Females—Custom of Khoja Mahommedans—Disinheritance during the father's lifetime only—Surrender of shares—Renunciation of inheritance in the lifetime of the father null and void.

Two Descriptions of Exclusion.—Exclusion is either entire, or partial. By entire exclusion is meant, the total privation of right to inherit. By partial exclusion is meant, a diminution of the portion to which the heir would otherwise be entitled. Entire exclusion was formerly brought about by some of the personal disqualifications enumerated in principle (6), *infra*, or by the intervention of an heir; in default of whom, a claimant would have been entitled to take, but by reason of whose intervention he has no right of inheritance, *Macn. Prin.* 84; *Bail. on Inh.* p. 57.

Four Causes of Exclusion.—Mahomedan lawyers have recognized four causes of exclusion from inheritance—viz. slavery, homicide, difference of religion, and difference of allegiance, *Macn. Prin.* 6.

Slavery.—Difference of religion, and difference of allegiance no longer exist. Slavery has been abolished by Act V. of 1843, difference of religion by Act XXI. of 1850, and difference of allegiance by the subversion of the Mahomedan rule, *Elb.* 59. The latter Act has not a retrospective operation. It applies only to conversions subsequent to its passing, *Decree of S. A. in A.* No. 99 of 1858.

Homicide.—Homicide is a bar, but only so far as to preclude the slayer from inheriting the property of the slain. *Sirajiyyah*, p. 2; *Hedaya*, vol. iv. p. 273, 275, 276; 1 *S. D. A. Beng.* 75, note; *Baillie on Inh.* 21. With the Soonees the homicide may be intentional, or un-intentional. But with the Sheeas it must be intentional.

There must have been malice *prepense*; otherwise it is no impediment to inheritance, *Elb.* 59, 65; *Macn. Prin.* 30. Mere suspicion of murder is not sufficient to exclude from inheritance. The crime must be fully established to bar it, *Macn. Prec.* p. 87, *Cas.* vii.*. The above four causes are the only impediments to inheritance. The repudiation, therefore, by the father on account of a private quarrel with his daughter, born in wedlock, or whose parentage he had acknowledged, cannot operate to exclude her from the inheritance, *Macn. Prec.* *Cas.* i. p. 121.

Insanity and Blindness.—Mental derangement, or any description of insanity and blindness, is not among the impediments to succession; but persons afflicted in this manner are entitled to their legal shares as other heirs, *Macn. Prec.* p. 89, *Cas.* x.

Effect of Disqualification.—The effect of disqualification upon the person who is the subject of it, is absolute exclusion from the right of inheritance, and upon all others the same as if the disqualified person were actually dead. But while the existence of a particular heir has the effect of entirely excluding from the inheritance some persons who would be otherwise entitled to participate in it, it merely reduces the shares of others from a higher to a lower degree, which is called in law partial exclusion. A disqualified person, though he is himself incapable of deriving any benefit from his relationship to the deceased, is nevertheless the means of partially excluding others, *Bail. Inh.* p. 31.

Heirs not liable to Exclusion.—Parents, children, husband, and wife, must in all cases get shares, whatever may

* The claimant in this case was probably convicted under the absurd rules of evidence observed in the Mahommedan criminal law, by which an accused person was convicted and punished, not according to the offence of which he had been guilty, so much as, according to the quantum of evidence adduced against him. It appears that the claimant was sentenced to twelve years' imprisonment, on suspicion of murder, with which he was charged; and to justify exclusion from inheritance, complete proof is requisite. It may here be observed, that homicide, of whatever description, however accidental, if fully proved, excludes the person who committed it, from inheriting the property of the slain, provided he was the cause, but not if the occasion merely, *Macn. Prec.* p. 87, *note*.

be the number, or degree of the other heirs, *Macn. Prin.* 11, p. 2.

Females.—Females are not excluded from inheriting property, nor are their powers of alienation restricted, *Elb.* 42. The property of a female, however acquired, devolves on her own heirs, *Macn. Prec.* 85.

A Mahomedan lady can sell, or give away her property as she pleases, *Mahommeél Zuheerue Huq v. Mussumat Butoolun*; 1 *W. R. Civ. Rul.* 79.

When a mother makes a gift to her children, and one of them seeks to set it aside as fraudulent so far as it affects the plaintiff's right of inheritance, so long as the mother is alive and admits the execution of the deed of gift, the plaintiff is not in a position to disturb it, and it is quite immaterial in such a case whether the plaintiff's consent was, or was not given it, *ib.*

Custom of Khoja Mahomedans.—By their custom, when a widow dies intestate and without issue, property acquired by her from her deceased husband does not descend to her own blood relations, but to those of her deceased husband. In the goods of *Malbai*, 2 *II. C. Rep. Bomb.* 292.

If no blood relations of the deceased husband are forthcoming, the property left by the widow belongs to the Jamat, *ib.*

Quære the degree of relationship which will entitle members of the deceased husband's family to succeed, *ib.*

Disinheritance during the Father's Lifetime only.—A father may dis-inherit an heir on a division of his property during his lifetime, *Macn. Prin.* 83, *post*, p. 87. But a simple repudiation can be no legal bar to his succession after his father's death, *Macn. Prec.* 121.

Surrender of Shares.—Any of the heirs may surrender his share of inheritance for a consideration. He must, however, be included in the division, as the portions of the other shares will otherwise be affected, *Macn. Prin.* 87. Thus in the case of there being a husband, a mother, and a paternal uncle, the shares are one-half and one-third. Here, according to principle 64 (*post*, p. 58), the property must be made into six shares, of which the husband was entitled to three,

the mother to two, and the paternal uncle, as a residuary, to the remaining one. Now, supposing the estate left to amount to six lacs of rupees, and the husband to content himself with two, still, as far as affects the mother, the division must be made as if he had been a party, and of the remaining four lacs the mother must get two; otherwise, were he not made a party, the mother would get only one-third of four, instead of one-third of six lacs as her legal share, and the remainder would go to the uncle as residuary, *Macn. Prin.* 87; *Sudagopah Charloo Man. Civil Law*, § 11, p. 7.

Renunciation of Inheritance in the Lifetime of an Ancestor null and void.—Renunciation implies the yielding up a right already vested, or the ceasing, or desisting from prosecuting a claim maintainable against another. It is evident that during the lifetime of the mother the daughters have no right of inheritance, and their claim on that account is not maintainable against any person during her lifetime. It follows, therefore, that this renunciation, during the mother's lifetime, of the daughter's shares is null and void, it being, in point of fact, giving up that which had no existence; such act cannot therefore invalidate the right of inheritance supervenient on the mother's death, or be any bar to their claim of the estate left by her, *Macn. Prec.* p. 89, Cas. xi.

SECTION III.

ADOPTION.

Similar to that amongst the English—Deed of, inoperative as gift or testamentary disposition—Acknowledgment by father.

Adoption* amongst Mahommedans is similar to that amongst the English. It confers no right of inheritance,

* By the term adoption here used, affiliation by distinct claim of parentage is not intended, but merely the reception by the adopting father into his family of a child, who notoriously and avowedly belongs to another family. In this particular the Mahommedan law seems to agree with the English, and the Hindoo with the Roman (see *Grady on the Hindoo Law of Inheritance*, p. 17); *Macn. Prec.* p. 86, note †.

as amongst Hindoos, *Macn. Prec.* p. 86 (see *Dec. of S. A. in A.* No. 12, of 1817); adopted children are entitled to nothing more than what their adoptive father gives them.

A deed of adoption by a Mussulman, declaring that the adopted son should succeed to his property and title, was held on appeal to be inoperative and void, either as a deed of gift, or as a testamentary disposition, no delivery of possession and relinquishment by the donor, or seizin by the donee, having taken place, *Jeswunt Sing-jee Ubby Sing Jee v. Jet Sing-jee Ubby Sing Jee*, 3 *Moore's Ind.* Ap. 245.

An adopted son cannot inherit amongst Mahommedans, *Khajah Oheea Khan v. Shahabad (Collector of)*, 9 *W. R. Civ. Rul.* 502. *Cal.*

SECTION IV.

ILLEGITIMACY.

Law scrupulous in bastardizing issue—Acknowledgment by father legitimizes issue—Only inherit from mothers and their kindred—Illegitimate son of Christian by Mahommedan woman—Children of slave-girls—When husband dies before wife—Of the rights of children—Of a woman marrying again during the life of first husband—Succession to property of illegitimate child of Mahommedan woman.

Law scrupulous in Bastardizing Issue.—The Mahomedan law is very scrupulous in bastardizing the issue of any connection, in which it can be shown by presumption, that there has been cohabitation and acknowledgment of paternity, *Ranee Rosheen Johan v. Rajah Syud Enaet Hossein*, 5 *W. R. Civ. Rul.* 4. *Cal.* Continual cohabitation and acknowledgment of parentage is presumptive evidence of marriage and legitimacy, *Khojah Hidayut Oollah v. Rai Jan Khanum*, 3 *Moore's Ind.* Ap. 295.

The legitimacy, or legitimation of a child of Mahomedan parents may be presumed or inferred from circumstances, without proof—or at least without any direct proof—either of a marriage between the parties, or of any formal act of legitimation, *Mahomed Bauker Hossein Khan Bahadoor v. Shurfoonissa Begum*, *W. R. Civ. Rul.* 373. *Cal.*

The Mahomedan law lays it down that legitimacy may be presumed or inferred from circumstances, without direct proof, *Khajah Mahomed Gouhur Ali Khan v. Hurratonissa*, 2 *W. R. Civ. Rul.* 52. *Cal.*

A child born in wedlock is presumed to be a child of the husband of the mother, legitimacy following the marriage bed, *Jeswunt Sing-jee Ubby Sing Jee v. Jet Sing-jee Ubby Sing Jee*, 3 *Moore's Ind. Ap.* 245.

The celebration of the seventh month of pregnancy, and the celebration of the birth of a son, are sufficient to prove the marriage and legitimacy of the son, *Wise v. Sunduloonissee Choudranee*, 7 *W. R. Pr. Council* 13. *Cal.*

Though there is no evidence of the celebration of any marriage ceremony, still the fact of a woman having constantly lived as a married woman with a man, and the fact of their children having lived as legitimate children with their parents, bring the case within the rule as to the presumption of marriage and legitimacy laid down by the P. C. in 8 *Moore's Ind. Ap.* 136, and by the High Court of Cal. in 1 *Marshall's Rep.* 428, *Ashruffunnissa v. Muss. Azeenum*, 1 *W. R. Civ. Rul.* 17. *Cal.*

An Acknowledgment by a Father renders a son, or daughter a legitimate child, and an heir, unless it is impossible for such child to be so, *Oomda Beebee v. Syud Shah Jonab Ali*, 5 *W. R. Civ. Rul.* 132. *Cal.* (see *post*).

A public acknowledgment of paternity will, of itself, raise a presumption of marriage between the person who makes it, and the mother of the child, without the father specially connecting his paternity with any particular woman. To rebut this presumption, the onus of proving the impossibility of the marriage is on the other side, *Rook Begum v. Shazadah Walagowhur Shah*, 3 *W. R. Civ. Rul.* 187. *Cal.*

Macnaghten, Prin. 33, *post*, p. 31, says, "If a man acknowledges another to be his son, and there is nothing which obviously renders it impossible that such relation should exist between them, the parentage will be established."

The legitimacy was held not to be established in a case in which there was no acknowledgment of the son by the alleged father, and the other evidence was doubtful, *Syud*

Furzund Ali v. Musst. Ushrufoon Nissa Begum, 1 W. R. Civ. Rul. 303. Cal.

By Slave-girls.—In Bombay it has been held that illegitimate sons of a Mahomedan by a slave-girl, if acknowledged by their father, are entitled to share equally with his legitimate sons, *Saiyad Walliulla v. Meran Sahed*, 2 H. C. Rep. Bomb. 301.

Mere continued cohabitation, without proof of marriage or acknowledgment, is not sufficient to raise such a legal presumption of marriage as to legitimize the offspring. Marriage and acknowledgment may be presumed, but the presumption must be one of fact, and, as such, subject to the application of the ordinary rules of evidence. A subsequent marriage, so far from furnishing a ground for presuming a prior marriage *primâ facie* at least excludes that presumption, *Ashrufood Dowlah Ahmea Hossein v. Hyder Hossein Khan*, 7 W. R., Pr. Co. 1.

The presumption of legitimacy from marriage follows the bed, and whilst the marriage lasts, the child of the woman is taken to be the husband's child, but this presumption is not antedated by relation. An ante-nuptial child is illegitimate. A child born out of wedlock is illegitimate, but if acknowledged by the father he acquires the *status* of legitimacy; such acknowledgment may be express or implied, directly proved or presumed, *Ashrufood Dowlah Ahmea Hossein Khan v. Wazeeroon Nissa, Begum v. Hyder Hossein Khan*, 11 Moore's Ind. Ap. 94. The denial of a son, either of *nikalie* (regular), or *moolahar* (irregular) marriage, after an established acknowledgment, is untenable, though supported by a deed of disclaimer and repudiation by the father, *ib.*

The acknowledgment need not be formal. If it can be made out from his acts and conduct, it will suffice, 2 H. C. R. Bomb. 301, *supra*.

Macnaghten says, the latitude granted by the permission of polygamy, and the apparent facility of divorce, are not, it must be admitted, accordant with the strict principles of impartial justice; but the evil I believe exists chiefly in theory, and but little inconvenience is found to follow it in practice. It

is remarkable with what tenderness the rules relative to marriage and parentage are framed. Mr. Evans, in his Appendix to *Pothier*, treating of hearsay evidence, observes: "There is a disinclination to bastardize issue, which is sometimes perhaps carried too far. When parties are actually married, and there is no impossibility of the husband being the father of the issue of the wife, every consideration of decency and propriety repels the admission of evidence to the contrary. But when the question is, whether a person was or was not born during wedlock, it should be recollected that the interests of justice are concerned in preventing one, who is really a bastard, from usurping the rights of the legitimate members of the family; and there is no particular reason of public policy which requires that those who have the real rights in their favour should meet with peculiar obstacles in *substantiating the proof* of usurpation." "But the Mahomedan lawyers carry this disinclination much farther: they consider it a legitimate course of reasoning to infer the existence of marriage from the proof of cohabitation."—*Macn. Prin. Prelim. Remarks*, xxiii.

None but children who are in the strictest sense of the word *spurious*, are considered incapable of inheriting the estate of their putative fathers. The evidence of persons who would in other cases be considered incompetent witnesses is admitted to prove wedlock; and, in short, where by any possibility a marriage may be presumed, the law will rather do so, than bastardize the issue; and whether a marriage be simply avoidable, or void, *ab initio*, the offspring of it will be deemed legitimate. Much misconception exists, I imagine, however, relative to the Mahomedan law on the subject of legitimate and illegitimate issue, and it seems generally supposed that agreeably to its provisions no person can be considered a bastard. The learned Sale observes, that "among the Mahomedans the children of their concubines, or slaves are esteemed as generally legitimate, with those of their legal and ingenuous wives, none being accounted bastards except such only as are born of common women, and whose fathers are unknown." This, I apprehend, with all due deference, is carrying the doctrine to an extent

unwarranted by law; for where children are not born of women proved to be married to their fathers, or of female slaves to their fathers, some kind of evidence, however slight, is requisite to form a presumption of matrimony. The mere fact of casual concubinage is not sufficient to establish legitimacy; and if there be proved to have existed any insurmountable obstacle to the marriage of the putative father with their mother, the children, though not born of *common* women, will be considered bastards to all intents and purposes. Another learned author, also citing the law of *Solon*, that a bastard shall not be considered next of kin, nor any relation be supposed between him, and the proper sons, proceeds to state: "On the contrary, amongst the Mahomedans, as to the point of sharing the father's estate, there is no difference observed between the sons of the wife, the concubine, or the servant-maid; whereas in point of fact, the marriage of a free woman, proved or presumed, is the only ground for considering her issue legitimate." *Puffendorff*, b. iv. ch. xi. § ix. It must be admitted, at the same time, that there is no more difficulty in establishing a marriage by the Mahomedan, than by the Scottish law, according to which, though no formal consent should appear, marriage is presumed from the cohabitation or living together at bed and board of a man and woman who are generally reputed husband and wife. Marriage also, according to this code, is entirely a civil contract. In answer to the question as to whether it was necessary for a marriage to be celebrated by a Kazeer, the law officers attached to the Provincial Court of Bareilly delivered an opinion, on the 19th of May, 1823, suggesting the expediency of the observance of this form, rather than its necessity. They stated, for instance, that silence is an argument of consent on the part of a woman, only, when she is addressed by her near guardian, or by the Kazeer, of which point of law illiterate persons might not be aware; and that where the bride does not appear in person, which is usual in this country, it is requisite that her agent should pursue his commission to act on her behalf by witnesses, in the presence of a Kazeer. One grand distinction between the Mahomedan law and our own is, that according to it, the husband and wife

are considered as distinct persons, who may have separate estates, contracts, debts, and injuries, *Macn. Prin. Prelim. Remarks*, xxiii.—xxv.

Only inherit from Mothers and their Kindred.—Illegitimate children can inherit only from their mothers, and mother's kindred, but not from their fathers, *Elb.* 42; *Macn. Prec.* p. 91. "Offspring belong to such as have consorts, but fornicators are prohibited from laying claim," says the Prophet. It is laid down in the *Kafee*, "The offspring of fornication, and the offspring repudiated by *laan*, or imprecation, take the maternal estate only, but not the paternal, nor can the father inherit from them. The father of such offspring cannot be considered as standing in any degree of relation to them; and their relation to their father being cut off, they are consequently excluded from claiming relation with his family. It is also laid down in the *Hummadeea*, that the parentage of the fruit of fornication is not established in the father," *Macn. Prec. Cas.* xii.

Illegitimate Son of Christian by Mahomedan Woman.—The natural son of a Christian by a Mahomedan woman, if brought up in the Christian religion, cannot of right inherit her property. In the goods of *Bebee Hay*, 3rd Term, 1819; *East's N. of Ca.* 105, *Sup. Court, Cal.*

The Mahomedan law is not applicable to the illegitimate child of a Mahomedan woman brought up and dying a Christian, *Mussumat Naney v. Mary Anne Burgess*, 1 *W. R. Civ. Rul.* 272. *Cal.*

Children of Slave-girls when Husband dies before Wife.—If the husband die before his wife, his children by slave-girls have no right to the wife's property. According to law the children of the wife will inherit all the property, both real and personal, left by their mother. If the wife died before her husband, he was entitled to a fourth of her property, and his legal share of it according to law must be distributed amongst his children, whether by wife or slave-girls, in proportion of two shares for a son, and one for a daughter, *Macn. Prec.* p. 95, *Cas.* xvii.

Of the Rights of the Children of a Woman marrying again during the Life of her first Husband.—A woman

married a second husband during the lifetime of her first, and had by him several children; will she be entitled to his property on his death? and supposing a man to die leaving a widow, three sons, a daughter, and a brother, claimants to his property, to what proportions of it will each of them be entitled? and if the deceased, during his last illness, had declared his intention that the persons claiming to be his widow and his children should take all his property, will such disposition hold good, and in what proportions will they share?

So long as the first marriage shall continue undissolved by divorce, or otherwise, the marriage of a woman to a second husband is wholly illegal; and if cohabitation be the consequence of such second marriage, it amounts to adultery, and the issue of such intercourse are bastards, who, with their mother, are wholly incompetent to inherit the estate of their deceased father. If the second question relate to the parties mentioned above, neither the person claiming to be his widow, nor her children are entitled to any proportions of her property, and the whole will go to the brother by right of consanguinity; but the verbal disposition made by the deceased during his last sickness will hold good to the extent of a third of his property, of which the person claiming to be his widow, and her sons will take shares alike. If the question relate generally to cases of persons having a legal claim to inheritance, the answer is, that the share of the widow is one-eighth, and the remainder should be distributed, to the exclusion of the brother, among the sons and daughters, in the proportion of a double share to the male, *Macn. Prec.* p. 97, Cas. xix.

Succession to Property of Illegitimate Child of Mahomedan Woman.—The State (and not the mother of an illegitimate Christian child) is entitled to succeed to the property of that child dying intestate after he had attained to man's estate, and having neither wife nor legitimate child, *Musst. Nancy v. Mary Anne Burgess*, 1 *W. R. Civ. Rul.* 272. *Cal.*

The illegitimate son of an Englishman by a Mahomedan woman died intestate without lawful issue, leaving him

surviving, his mother, his mistress, and several illegitimate children. Held that his property passed to the Crown in default of heirs, *The Sec. of State v. Admin.-Gen. Bengal ; Beng. L. R. orig. civ. side*, p. 87.

SECTION V.

POSTHUMOUS CHILDREN.

Heir must be begotten, though not actually born, before ancestor's death—Portions to be reserved for children in the womb, there being sons—Of a child in embryo, there being heirs, who would succeed only on its default—Where there are heirs who would take at all events—Distinction between cases involving the child's paternity, and those which do not—Whether child is born alive.

• A posthumous son has a legal share in his father's property, *Abodoonissa Khatoon v. Ameeroonissa Khatoon*, 9 W. R. Civ. Rul. 257. Cal.

Heir must be Begotten, though not actually Born, before Ancestor's Death.—It is not necessary that the heir should be actually born ; if he has been begotten before the death of the person from whom he claims, and was actually born alive, it suffices for all legal purposes, *Ellb.* 40.

The Portions to be reserved for an Infant in the Womb, there being Sons.—Where a person dies leaving a wife pregnant, and he has sons, the share of one son must be reserved in case a posthumous son should be born, *Macn. Prin.* 103 ; *Bail. Inh.* 161.

Of a Child in Embryo, there being Heirs who would succeed only on its Default.—Where a person dies leaving his wife pregnant, and he has no sons, but there are other relatives who would succeed in the event only of his having no child—as would be the case, for instance, with a brother or sister—no immediate distribution of the property takes place, *Macn. Prin.* 104.

Where there are Heirs who would take at all events.—But if those other relatives would succeed, at all events, to some portion larger without, than with a child, (as would be the case, for instance, with a mother,) the property will be

distributed, and the mother will obtain a sixth, the share to which she is necessarily entitled ; and afterwards, if the child be not born alive, her portion will be augmented to one-third, *Macn. Prin.* 105.

Distinction between Cases involving the Child's Paternity and those which do not.—Mr. Baillie, in his work on Inheritance, p. 159, says : “ The law has so strong an inclination to favour the paternity of children, that there is a marked distinction in the application of the rules respecting pregnancy to the subject of inheritance, between cases where the paternity of the foetus is involved, and those where the question is merely, whether it shall be entitled to a portion of the succession, or not. Thus, if the pregnant woman be the widow of the person whose succession is in dispute, the child shall inherit, if born within *two* years from such person's decease, unless the woman has acknowledged the completion of her *iddut*, which would be tantamount to an admission, that she was either not pregnant at the death of her husband, or had been intermediately delivered of another child. While, if she were the widow of a relative of the deceased—as of his father, or son, for instance—it is necessary that she should be delivered within six months from his death, in order that her child may participate in his inheritance. The reason assigned by the commentator for this distinction, is the necessity of finding a legal descent for the infant in the first instance; whilst in the second, his paternity being already established, and the question reduced to one of mere inheritance, it is necessary to establish his existence in the womb at the death of the party from whom he claims to inherit; and that can be predicated with certainty only when he is born at, or within the shortest period of gestation,* reckoning from that event.”

Whether Child is born alive.—As, on birth, a child acquires a vested interest in his parent's property, which passes on his death to his representatives, it often becomes a question, where the child is said to have died immediately on delivery, whether he was born alive, or dead. The Mahomedan law

* The periods of gestation are discussed by Mr. Baillie in his work on Inheritance, p. 155.

has laid down certain rules in cases of this kind. There is of course no difficulty where the child, being actually born, exhibits signs of life, as by sneezing, crying, or motion; but if it should die in birth the vesting of the estate will depend upon whether the greater, or smaller portion of the body came into the world before death. If the child comes into the world in the natural way, with its head foremost, then, if the whole breast is protruded whilst he shows signs of life, the infant is said to have been born alive, and the estate vests in him. But if the order of nature be reversed, and the feet are protruded into the world first, then the right of inheritance will depend upon the birth having reached as far as the navel, whilst the child has shown signs of life.

As to the distribution of shares in cases of pregnancy, see *Bail. Inh.* 162.

SECTION VI.

MISCELLANEOUS RULES.

Missing person living with regard to his own, and defunct with regard to the estate of others—Period of absence—If missing person be a co-heir—De commorientibus, Contemporaneous deaths—Vesting of inheritance—Right of representation—Plurality of heirs—Increase of estate.

Missing Person Living with respect to his own, and Defunct with regard to other Persons' Property.—When one of the heirs is missing—that is to say, when he is absent, and there is no certain intelligence whether he be alive, or not—he is considered as living with respect to his own estate, and defunct with respect to the estate of others. *Macn. Prec.* p. 92, note, *Elb.* 63.

Period of Absence.—Thus, if he had an estate when he disappeared, or if at that time he was entitled to a share in a joint property, such property cannot be inherited before his death be proved, or until he would have been ninety years of age, but must remain in trust until that time, when it will devolve on those of his heirs who are in existence then. On the death of any of the relatives of a missing person to whom he is an heir, he is so far con-

sidered to be alive, that his share is set aside; but it is not reserved in trust for him and his heirs, but delivered to the other heirs, who would have taken it, if he had been dead. If he returns after this, he will be entitled to his share: but if he does not return, it devolves on the heirs who came into possession at the former distribution, but not to the heirs of the missing person.—*Sirajiyyah* 48; *Ib. Com.* 101; *Hedaya*, Vol. II. p. 292; *Macn. Prec.* p. 92; *Baillie Inh.* p. 166; *Ellb.* 63.

Aboo Huneefah allowed 120 years from birth; Mahommed 110; Aboo Yusuf, 105; and the *Hedaya* 90 years, which is the generally received period, *Sirajiyyah*. But Baillie, in his Treatise on Inheritance, p. 167, suggests that the judges might perhaps consider themselves at liberty to exercise their own discretion, a latitude which some of the followers of Aboo Huneefah appear to have advocated; and this suggestion obtains additional strength in consequence of the facilities now-a-days of locomotion.

Macnaghten, Prin. 101, says: The property of a missing person must be kept in abeyance for ninety years from the time of his birth. During that time he is considered as living with respect to his own estate, but defunct as to that of others.

According to the Mahomedan law, the death of a missing person may be pronounced when ninety years from his birth may have elapsed, after which his estate may be divided among his heirs, 15 April, 1831, 5 *S. D. A. Rep.* 108; 1820, 2 *Borr.* 20, *Bomb. S. A.*

After sixty-five years disappearance of a person, the Courts must presume his death, unless proof to the contrary be adduced, 2nd July, 1856, *Doorjaim Beebee Petr.* Case 98, See 4 *S. D. A. Ben. Rep.* 231.

The son and daughter of an absent Mahomedan (declared to be forty years old when he left, and to have been missing thirty-five years) sued for the recovery of one-half of the family estate from the widow, and son of his brother. The law officers declared ninety years from the time of birth to be allowed to a person in possession of an absentee's estate; but that another administrator of the estate should be

appointed if it were mismanaged by the person in possession. The Court held that, under the circumstances, the estate appeared to have been mismanaged, and ordered the heirs of the absentee to be put into possession of his share. 1820, 2 *Borr.* 20 *Bomb. S. A.*

Where a person died leaving property, and four sons, two of whom died childless. The survivors, A and B, lived in joint possession of the estate; B afterwards died, leaving two sons, C and D, and two daughters, E and F. These persons remained with their uncle, and his sons, G and H, as joint proprietors of the lands in question. A then died, and the survivors still continued to live together on the same terms; afterwards C and G successively died, and D has since disappeared. Last of all H died, leaving a widow, who is the only present surviving claimant, except the daughters of B.

“The estate must be divided into sixteen portions; the widow of H is entitled to two, E and F to seven, or three and a half each. The remaining seven properly belonging to the missing person D, should not immediately devolve upon any of the other heirs. Four shares of it should be deposited with a trustee, and the remaining three should be entrusted to the person, or persons in possession of the rest of the property, to be kept until the expiration of the time for the re-appearance of the missing person. This period is ninety years from his birth. If he re-appear in this interval, the whole seven shares should be made over to him. If no tidings are heard of him before that period, his heirs will inherit the four shares in the hands of the trustee, and the other three shares will devolve upon the other heirs who came into possession at the former distribution.”—*Macn. Prec.* 92. *Cas.* xiii.

The principle decided by this case is, that a missing person is considered dead as far as regards the property of others, but living as far as regards his own property. He shall not inherit from others during the ninety years, nor shall others inherit from him. *Ib. n.*

The surviving representatives of B were D, E, and F; and the surviving representative of A was H. The first

three were entitled to eight shares of the property in right of their father, B, and the last-mentioned to eight in right of his father A; but of the first eight shares D, by virtue of his being a male, was entitled to four, and E and F to two each. After D disappeared, H died, leaving a widow, who was entitled to two shares only of his eight portions, and the remaining six devolved on the children of his paternal uncle B, of which six, D, as male, was entitled to three, or a double portion; but it being a rule that a missing person is to be considered living as to his own property, but defunct as to the property of others, after the disappearance of D his four shares, which descended to him absolutely, from his father, and of which he was in possession before he disappeared, should be placed in the hands of a trustee, and the three shares which would devolve on him, only, in the event of his proving to have been alive at the date of the death of his cousin H, should be given to the other heirs to be enjoyed by them, subject only to the condition of the re-appearance of the missing person, *Macn. Prec.* p. 92, *note*.

If Missing Person be a Co-heir.—If the missing person be a co-heir, the estate must be distributed, as far as the other co-heirs are concerned, provided they are not excluded by the existence of such missing person, or they would take at all events, whether such person were living, or dead, *Macn. Prin.* 102. Thus, in the case of a person dying leaving two daughters, a missing son, and a son, and daughter of such missing son. In this case the daughters will take half the estate immediately, as that must be their share at all events; but the grandchildren will not take anything, as they are precluded on the supposition of their father being alive, *Macn. Prin.* 102.

De Commorientibus, Contemporaneous Deaths.—If two, or more persons die about the same time, and it cannot be precisely ascertained which died first, the presumption of the law, according to the prevailing doctrine, is, that all of them died at the same time; and the inheritance must be divided among the survivors, as if the intermediate heirs, who died at the same time with the original proprietor, had never existed, *Macn. Prin.* 106.

The following is an example of this rule : A, B, and C, are grandfather, father, and son. A and B perish at sea without any particulars of their fate being known. In this case, if A have other sons, C will not inherit any of his property, because the law recognizes no right by representation, and sons exclude grandsons, *Macn. Prin.* 106 *note*. With reference to the law which governs such cases in England, see *Bl. Com.* Vol. II. p. 516, *note* by Christian.

Vesting of Inheritance.—The estate of a person vests on his death in his surviving heirs, who are entitled to succeed to it immediately, *Sadagopah Charloo Man, M. Civ. L.* §10.

Right of Representation.—But the right of representation—*i.e.* the right to represent an heir of the deceased who had died before him, or her—does not obtain, the nearer of kin excluding the more remote. Thus if A dies, leaving behind him, three sons, and a grandson by a fourth, who deceased during his (A's) lifetime, the grandson is excluded by the surviving sons of A, because A's property could not vest in his deceased son during A's lifetime, *Macn. Prin.* 9. But, if any of these sons die subsequent to its vesting, though before its actual distribution, his descendants succeed by representation to the share he would have obtained, had distribution taken place during his lifetime, *Macn. Prin.* 96, *see post, Vested Inh.*

Plurality of Heirs.—To the estate of a deceased person a plurality of heirs may succeed simultaneously, according to their allotted shares; and inheritance may partly ascend and partly descend at the same time, *Macn. Prin.* 8.

Increase of Estate.—Until a division takes place the estate is considered to belong to the deceased, so that any increase accruing after his death, is held to be part of the estate, *Elb.* 59.

SECTION VII.

ORDER OF SUCCESSION ACCORDING TO THE SOONEE SCHOOL.

Primogeniture—Father may disinherit any of his sons—Three different classes of heirs: * 1, Sharers; 2, Agnates; 3, Uterine relations—1. Sharers are first—2. Residuaries next—Return—3. Distant kindred are next—4. Successor by contract—5. Acknowledged kindred—6. Universal legatee—7. Public treasury.

Primogeniture.—Primogeniture confers no superior right among the Soonees.† All the sons, however numerous, inherit equally, *Macn. Prins.* 2.

A Father may disinherit any Son.—If the father of three sons, when of sound disposing mind, in his lifetime, divide his property between two of his three sons, and they retain separate possession of their respective portions, the third son will not be entitled to any portion of the property. The father may therefore disinherit any one of his sons, during his lifetime, *Macn. Prec. cas.* 1, p. 83.

The Mahommedan lawyers have divided heirs into three different classes, viz. :—

1. Sharers, *ashab-ool-furaiz*.
2. Agnates, *usubat*.§
3. Uterine relatives, *zurool-arham*.

The last two have been termed, from their position in the inheritance, residuaries, and distant kindred, *Siraj.* 10. 28; *Bail. Dig. M. L.* 685.

1. **The Sharers** are first. They are so called because a certain share of the estate is expressly allotted to each of them in the Koran, and particularly in the fourth chapter of it, *Siraj.* 2, 57. These shares are liable to be increased, diminished, or even withheld, according to the number and classes of persons entitled to them, and to the residue, *Elb.* 43.

* Heir is used in its broadest sense, to signify any person who has a right to inherit any species of property.

† Amongst Sheeas primogeniture is allowed to a limited extent; the eldest son inherits, if he be worthy, the father's sword, Koran, wearing apparel, and ring, *Macn. Prins.* 33. *Post*, "*Inh. accord. to Sheea School.*"

§ Pronounced Usubah.

2. Residuaries.—Next come those who may be distinguished by the name of residuary heirs. They are all such as take what remains of the inheritance, after the shares have been duly distributed, *Siraj. Com.* p. 57. The residue varies with the number and classes of persons entitled to legal shares, *Ellb.* 43. And they are of two sorts, residuaries by consanguinity, or relation, *nusub*, or kindred, and residuaries for special cause, the former of whom are preferred in order of succession; the latter are the masters and mistresses of enfranchised slaves, or their male residuary heirs, *Siraj.* 2, 58; *Shureefea. Bail. Dig. M. L.* p. 685. If no sharers be living, the residuaries take the whole property, *Siraj. Com.* p. 58.

If, on the other hand, there be no residuaries, the surplus, or residue reverts, or returns to the sharers connected with the deceased by consanguinity. This is technically called the return, *Ellb.* 58. The surplus never reverts to the widower, or to the widow while any heirs by blood are alive, *Siraj.* 58. The return is divided, or distributed amongst the sharers in proportion to their shares, *Bail. Dig. M. L.* 685, *see post*, “Distant Kindred.”

3. Distant Kindred.—On failure of the two preceding classes, the distribution is next made amongst those next of kin, who are neither sharers, nor residuaries, and they are called the *distant kindred*, *Ellb.* 43. *Siraj. Com.* p. 58.

4. Successor by Contract or Mutual Friendship.—Should none of the distant kindred be living, and capable of inheriting (unless there be a widow, or a widower who is first entitled to a share), the estate goes to him who may be called *the successor by contract*. Thus, if A, a man of an unknown descent, say to Z, “Thou art my kinsman, and shalt be my successor after my death, paying for me any fine, or ransom to which I may become liable,” and Z accept the condition, it is a valid contract in Arabian law. So if Z, also a man whose descent is unknown, make a similar proposal to A, who likewise accepts it, the contract is mutual and similar, and they are successors by contract reciprocally, *Siraj.* 58; *Ellb.* 44.

5. Acknowledged Kindred.—If no such agreement had

been made, but if A in his lifetime had acknowledged Z, a man of an unknown pedigree, to be his brother, or his uncle, *i.e.* to be related to him by his father, or his grandfather, though in truth, he had no such relation—and the bare acknowledgment of A cannot be admitted as a proof of it—yet if A die without re-tracting his declaration, Z is called the acknowledged kinsman, by a common ancestor, and stands in the fifth class of successors, but takes the estate before the general devisee, *Siraj.* 59; *Macn. Prin.* 55. This is called a declaration of *nusub*, or descent.

In this, three conditions must be observed. The declaration of descent must be as against another, *i.e.* it must be in such terms as, at least, to imply the descent of the person acknowledged from such other person, than the acknowledger himself; as, for instance, 1st, when the deceased has declared a person of an unknown descent to be his brother, which involves a declaration against his father that the person is his son. But if the acknowledgment be vague, without anything to qualify it, by which the descent might appear, as, that the acknowledged was cousin of the acknowledger, it would not be sufficient. 2ndly, the declaration must be such as not to establish the descent, or paternity of the person acknowledged, as, when, it is not acquiesced in by the father—as, for instance, an acknowledgment of one as a brother assented to by the acknowledger's father—its effect would be to give him an interest in the inheritance independently of the acknowledgment, namely, as brother to the deceased; and 3rdly, the acknowledger must die without re-tracting his acknowledgment, *Bail. on Inh.* 18.

6. Universal Legatee.*—The person next in succession is one to whom the deceased has bequeathed the whole of his property; for though the law secures to his heirs, of the five preceding classes, two-thirds of his estate, yet it so far respects his dominion, while he lived, over his own property, and his *will* as to the disposal of it, after his decease, that it will rather give effect to an intention not strictly conformable

* Universal is here used with reference to the extent of the property devised.

to law * than suffer his estate to escheat, which it would, if he had no heir, *Siraj*. 59 ; *Elb*. 44.

7. Public Treasury.—And lastly to the *beit-ool-mal*, or public treasury, if there is no will. But this takes place only where no individual has the slightest claim, *Macn. Prins*. 56. But the relations of the husband, and son of a woman, not being her own relations, do not come within the description of any of the heirs enumerated, *Macn. Prec. cas.* iii. p. 85.

* The Koran allows only pious bequests.

CHAPTER II.

SECTION I.

LEGAL SHARERS.

Who are legal sharers—Sharers are twelve in number—Ten founded on kindred; Two on special cause—Table showing the character of sharers—Males—1, Father—(Three characters: 1, A mere sharer; 2, A mere residuary; 3, Sharer and residuary)—2, A true grandfather—3, The half-brothers of the same mother only—Females—1, Daughter; 2, Son's daughter; 3, The mother; 4, True grandmother; 5, Full sisters; 6, Half-sisters of the same father; 7, Half-sisters by the same mother—Two founded on special contract—1, Husband; 2, Wife.

Who are legal Sharers.—Sharers, as we have already observed (*ante*, p. 24), are all those for whom shares have been appointed in the Koran, the traditions, or with general consent.

The sharers are named with reference to their relationship to the deceased.

The shares are one-half, one-fourth, one-eighth, two-thirds, one-third, and one-sixth, *Siraj*. p. 3, 64, *Elb*. 45.

Sharers are Twelve in Number.—The sharers are twelve in number, of whom the rights of ten are founded on *nusub*, or kindred, and two on special cause. Of those claiming on the ground of kindred, there are three males, and seven females.

Table showing the Character of Sharers.—The following table shows the character of the sharers, the circumstances under which they inherit, and the extent of the shares they take. See *Siraj*. p. 3. The first of the **Males** is the **1, Father**. He has three characters:—

1, Mere Sharer.—First. Where he takes merely a share; in which case he is entitled to one-sixth—that is, when the deceased has left a son, or son's son, how low soever, *Siraj*. 4, *Elb*. 47; *Bail. Dig. M. D.* 686.

2, Mere Residuary.—Secondly. Where he is merely the residuary—that is, when there is no successor but himself, and he takes the whole property as residuary; or when there is only a sharer with him, who is not a child, nor child of a son, how low soever—as a husband, a mother, or a grandmother—and the sharer takes his share, and the father takes what remains as residuary, *ib.*

3, Sharer and Residuary.—Thirdly. When he is both a sharer and residuary—that is, when there are with him a daughter, and a son's daughter, but no son, or son's son—he has one-sixth as a sharer, the daughter one-half; or two-thirds when there are two, or more daughters, the son's daughter, one-sixth, and the father the remainder as residuary, *Ellb. 47; Bail. Dig. M. L. 686.*

2, True Grandfather is the second of the males entitled by *nusub*. A true grandfather is a male ancestor into whose line of relationship to the deceased no female—*i.e.* no mother—enters; as the father's father, his father, and so forth. A false grandfather is one into whose line of relationship to the deceased a female—*i.e.* a mother—enters; as the father of the father's mother. The true grandfather is entirely excluded by the father; but in default of the father, the true grandfather comes into the place of the father, and where there is a son of the deceased, or son's son, *h. l. s.*, takes one-sixth, *Macn. Prin. 35, 36.* The true grandfather, however, does not, like the father reduce a mother's share to one-third of the residue, nor entirely exclude a paternal grandmother.

A true grandfather excludes, however, all the brothers and sisters of the deceased, according to *Aboo Huneefa*, with whom the *futwa* concurs, *Bail. Dig. M. L. 687.*

3, The Half-brothers of the same Mother only are the third of the males, entitled by *nusub*. They are the uterine brothers. When there is but one, he is entitled to one-sixth, in the absence of children, or

children of a son, how low soever, and father and true grandfather; and when there are two, or more of them, one-third, which is equally divided amongst them all, *Macn. Prin.* 31.

Of Females who are entitled by *nusub*—

- 1, **The Daughter is the first.**—Her share, when she is alone, is one-half, and when there are two, or more daughters, they take two-thirds between them, *Macn. Prin.* 16, 17. When there are both sons and daughters, the sons make the daughters residuaries (*Macn. Prin.* 16, *note*), the share of each son being equal to that of two daughters, *Bail. Dig. M. L.* 687.

A Step-daughter—*i.e.* the daughter by the co-wife of the woman's husband—cannot participate in her inheritance, *Macn. Prin.* 99.

- 2, **Son's Daughters are the second.** When there is no child of the loins the son's daughters take as daughters—*i.e.* if one, she gets half, if two, or more, they get two-thirds between them, *Macn. Prin.* 18. When there is a son, the children of a son take nothing. When there is one daughter, she takes one-half, and the son's daughters have one-sixth; and if there are two daughters, they take two-thirds, and there is nothing for the son's daughters, *Macn. Prin.* 19; *Bail. Dig. M. L.* 687,—that is, when there is no male amongst the children of a son. But if there is a male, he makes the females (whether his sisters or cousins) residuaries with him, *Elb.* 46. So that, if there were two daughters, or more of the loins, they would have two-thirds between them, and the remainder would pass to the children of the son in the proportion of two parts to the males, and one part to the females. Though the male were in a grade below them, he would make them residuaries with him, so that the remainder would be between him, and them in the same proportion, or two parts to each male, and one to each female. Thus, if there were two daughters, a son's daughter, the daughter of a son's son, and the son of a son's son, the

daughter would take two-thirds, and the remainder would go between the son's daughter, and all below her, in the proportion of two parts to a male, and one part to a female. The principle in this case is, that a son's daughter becomes a residuary with a son's son, whether he is in the same, or a lower grade with herself, when she is not a sharer, *Elb.* 46; *Bail. Dig. M. L.* 687.

3, The Mother is the third of the females entitled by *nusub*. She, like the father, has three characters:—

1. Where there is with her a child, or child of a son, how low soever; or where there are two, or more brothers, or sisters, whether of the whole, or half-blood, and on whatever side they may be, the mother takes one-sixth, *Macn. Prin.* 33; *Elb.* 47; *Bail. Dig. M. L.* 688.

2. Where there are none of these, in which case her share is one-third, *Bail. Dig. M. L.* 688. See *Macn. Prin.* 33.

3. Where the deceased has left a husband, or wife, and both parents; in which case the mother takes one-third of the *remainder*, after deducting the shares of the husband, or wife, *Elb.* 48; and the residue is to the father, according to all opinions, *Bail. Dig. M. L.* 688. But if, in the place of the father, there was a grandfather, the mother would have one-third of the whole property for her share, *ib.*

A Step-mother is not in law considered a mother, *Macn. Prec.* p. 99.

4, True Grandmother is the fourth. A true grandmother is a female ancestor, into whose line of relationship to the deceased, a false grandfather does not enter. Mother's mother, how high soever, and father's mother, how high soever, are true grandmothers, *Bail. Dig. M. L.* 688.

Every one into whose line of relationship to the deceased a mother enters between two fathers is a false grandmother, *ib.*

The share of a true grandmother on the father's, or mother's side, in the absence of the mother, is one-sixth, whether there be one or more, all partaking of it equally who are in the same degree, *Macn. Prin.* 6; *Bail. Dig. M. L.* 688.

The mother excludes both the paternal and maternal grandmothers, but the father excludes only the former, *Elb.* 48; *Macn. Prin.* 37.

When there are two grandmothers, one of whom is related to the deceased on both sides, and the other only on one side, Aboo Yoosuf has said—and there is one report to the same effect from Aboo Huncefa—that the one-sixth is to be divided amongst them equally, and the *futwa* concurs in this opinion, *Bail. Dig. M. L.* 688. See *Macn. Prins.* 37–40.

- 5, Full Sisters** are the fifth of the females entitled by *nusub*. In the absence of children, or children of a son, how low soever, and father, and true grandfather, and full brother, full sisters take as daughters—*i.e.* one gets one-half, and if there are two or more, they get between them two-thirds, *Macn. Prin.* 21, 23.

If there is a full brother with them, the male has the share of two females, *Bail. Inh.* 67; *Macn. Prin.* 3.

If there are daughters, or daughters of a son, how low soever, but neither sons, nor son's sons, nor father, nor true grandfather, nor brothers, the sisters, as residuaries, take what remains after daughters, or son's daughters have taken their shares; such residue being one-half, where there is one daughter, or son's daughter; or one-third where there are two or more. But full sisters cannot affect the shares of husband, or wife, mother, or true grandmother, *Macn. Prin.* 25; *Bail. Inh.* 68.

- 6, Half-Sisters by the same Father only** (consanguine) are the sixth class of the females entitled by *nusub*. They are like full sisters, when there are none, one takes one-half, and two, or more take two-thirds. With one full sister, however, they take one-sixth, that is, the complement between two-thirds, and one-half, *Macn.*

Prin. 27; but with two full sisters they have no partition in the inheritance, unless there happens to be with them a half-brother by the same father, in which case they become residuaries, *Macn. Prin.* 28. In that case, the full sisters take their two-thirds, and the children of the father only, have the residue between them, in the proportion of two parts to a male, and one part to each* female, *Bail. Dig. M. L.* 689.

7, Half-Sisters by the Mother only (uterino) are the seventh class of the females entitled by *nusub*. In the absence of children, or children of a son, how low soever, and father, and true grandfather, if there is but one, she takes one-sixth; if two, or more, they

- take one-third amongst them, *Macn. Prin.* 31, so
- that all brothers and sisters are excluded by a son, or son's son, how low soever, or a father or true grandfather. And children of the father—*i.e.* half-brothers and sisters on his side, are excluded not only by these, but also by a full brother; and children of the mother (or half-brothers and sisters on her side) are excluded by a child, though a daughter, and by a child of a son, a father and true grandfather, *Bail. Dig. M. L.* 689.

1. Husband.—There still remain two sharers. They are those who are entitled for special cause, and are the husband and wife. If there is no child, or child of a son, how low soever, the husband takes one-half of the wife's estate. If there is a child, or child of a son, he takes one-fourth, *Macn. Prin.* 15.

2. Wife.—So if there is no child, or child of a son, how low soever, the wife* takes one-fourth of the husband's

* The term *uqua*, or contract, in a strict sense signifies tying together, and the joining of two persons in matrimony is termed a contract of marriage. The proposal and consent of the parties are essential to the contract. The bride should express consent, if she be adult, and the guardian and witnesses should be present at the ceremony. Under these circumstances the wife is competent to inherit her husband's property, supposing her not to have been divorced from him, nor to have killed her husband, nor to be the slave of any one, nor to be of a different religion; such a widow takes one-eighth where there are

estate ; and if there is a child, or child of a son, how low soever, she takes one-eighth, *Macn. Prin.* 14. In both cases, where there are several widows, they all share equally, *Macn. Prec.* p. 93, cas. xiv. xv.; *Elb.* 46.

Sudagopah Charloo, in his “Manual of Mahom. Civil Law,” p. 14, arranges these sharers under four classes, thus :—

1st class: Father, mother, daughter, husband, and wife.

2nd class: True grandfather, true grandmother, and daughter of a son, how low soever.

3rd class: Full sister and half-brother, and sister by the same mother only.

4th class: Half-sister by the same father only.

The first class of sharers are *always* entitled to some share or other, *Macn. Prin.* 2.

The other three classes are liable to exclusion during the lifetime of one who is more nearly related to the deceased than themselves, except in the case of half-brothers and sisters by the same mother only, who are excluded by her, *Elb.* 45. This principle of exclusion operates also in the case of residuaries, *Elb.* 45.

According to Mahomedan law, where a man dies leaving no children, a sister's son can claim his inheritance after the widow has obtained her one-fourth share. By section 3 of Inheritance, *Macn. M. L.*, and case 15 of Precedents, *ib.*, the widow, under no circumstances, can be entitled to more than one-fourth of her husband's property, the rest going to his sisters' sons, and to various other distant members, after the widow's share has been satisfied. Case 15 says: “A widow takes one-eighth where there are children, and a quarter where there are none. The remainder goes to the legal sharers; in default of them, to the residuary heirs; in default of them, to the distant kindred.”—*Moonshee Mahomed Noor Buksh v. Moulvie Mahomed Hameedoor Huz*, 5 *W. R. Civ. Rul.* 23. *Cal.*

children, and a fourth where there are none. The remainder goes to the legal sharers; in default of them, to the residuary heirs; in default of them, to the distant kindred; and in their default it escheats to the public treasury.

In addition to her prior claim of dower, the widow takes her legal share, *Macn. Prec.* p. 95, cas. xvi.

A widow, being entitled to only one-fourth of her husband's property, is bound, if she claims the whole property, to show how she acquired it, *Sheik Musseeoollah v. Mussumat Beebee Sherifan*, 1 *W. R. Civ. Rul.* 123. *Cal.*

According to Mahommedan law, a widow, and two daughters are entitled between them to 19-24ths of the property of a deceased father, and husband, in the proportion of one-eighth and two-thirds, *Mahomed Ruhwan Khan v. Muss. Khajah Buksh*, 5 *W. R. Civ. Rul.* 221. *Cal.*

SECTION II.

DISTRIBUTION OF SHARES.

Number of shares—Persons entitled thereto—1, A half to five persons; 2, A fourth to two; 3, An eighth for one or more wives, where child; 4, Two-thirds for four persons; 5, A third for two persons; 6, A sixth for six persons—1st Class: 1, Husband, where neither a child nor child of a son; 2, A daughter of the loins; 3, A son's daughter, where no daughter of the loins; 4, A full sister; 5, A half-sister on father's side—2nd Class: 1, Husband, where child or son of a child; 2, Of wife or wives, where husband left neither child nor child of a son—3rd Class: Wife, or wives, where husband left child or child of a son—4th Class: 1, Two or more daughters of the loins; 2, Two or more daughters of a son, where none of the loins; 3, Two or more full sisters; 4, Two half-sisters by father, where no full sisters—5th Class: 1, Share of mother, where neither child nor child of a son, nor two brothers or sisters; 2, Two or more children of mother, male or female—6th Class: 1, Father, where child or child of a son; 2, Grandfather, where no father; 3, Mother, where child, or child of a son, or two brothers or sisters; 4, Grandmother; 5, Of son's daughter with daughters of loins; 6, Child of mother, male or female.

Number of Shares.—We have already seen, p. 28, that the number, or classes of shares are six.

Persons entitled thereto:—

1. A half is appointed for five persons.
2. A fourth is appointed for two persons.

3. An eighth is appointed for, one or more wives, when the deceased has left a child, or child of a son.
4. Two-thirds are appointed as the shares of four different persons.
5. A third is appointed for two persons.
6. A sixth is appointed for six persons.

1st Class.

1. A husband, when the deceased has left neither a child, nor child of a son.
2. A daughter of the loins.
3. A son's daughter, when there is no daughter of the loins.
4. A full sister.
5. A half-sister on the father's side, when there is no full sister.

2nd Class.

1. The share of a husband, when the deceased has left a child, or child of a son.
2. The share of a wife, or wives, when the husband has left neither child, nor child of a son.

3rd Class.

The third class is the share of one, or more wives, when the deceased has left a child, or child of a son.

4th Class.

1. The share of two daughters, or more of the loins.
2. The share of two, or more daughters of a son, when there is none of the loins.
3. The share of two full sisters, or more.
4. The share of two half-sisters by the father, when there is no full sister.

5th Class.

1. The share of a mother, when the deceased has left neither a child, nor child of a son, nor two brothers or sisters.
2. The share of two children, or more of a mother, whether they be male, or female.

6th Class comprises the share of

1. Father, when the deceased has left a child, or child of a son.
2. Grandfather, when there is no father.
3. The share of a mother, when the deceased has left a child, or child of a son, or two brothers, or sisters.
4. The share of a single grandmother, or of several grandmothers, when there are more at the time of inheriting.
5. The share of a son's daughter, with a daughter of the loins, to make up two-thirds.
6. And the share of one child of the mother, whether male or female.

CHAPTER III.

OF RESIDUARIES, OR USUBAT.*

Definition—Who are residuaries—Two kinds: 1, By kindred; 2, By special cause—Three classes of residuaries by kindred: 1, Those in their own right; 2, Those together with another; 3, Those in another's right—Residuaries in their own right are divided into three classes: 1, Descendants; 2, Ascendants; 3, Collaterals—No limit to residuaries whether in descent, or ascent—Residuaries by another—Residuaries with another—Residuaries of a Wulud-ooz-zina—Amongst residuaries of different kinds—Nearest preferred—Collateral amongst descendants of great-great-grandfather—Residuaries by special cause—Table showing character of residuaries.

Definition.—After the portions of the legal sharers have been taken from the estate there is a residue left. This passes to certain persons who are called residuaries. *Elberling*, 43, says: “Residuaries are those other relations of the deceased who are entitled to succeed to the residue left, after the claims of the legal sharers are satisfied. The residue varies with the number, and classes of persons entitled to legal shares.”

No female relative is primarily a residuary.

Who are Residuaries.—All persons who are not sharers, —in other words, all those for whom no share has been appointed, and who are entitled to the residue, after the sharers have been satisfied, or to the whole, if there are no sharers.

There are two kinds.—There are two kinds of residuaries, those by *nusub*, or kindred to the deceased, and those for special cause.—*Elb.* 51.

Three Classes of Residuaries by Kindred.—There are three classes of residuaries by kindred, viz.:—

* See *ante*, p. 24

1. Those in their own right.
2. Those in another's right, *Elb.* 51, *Siraj.* 72.
3. Those together with another.

1. Residuaries in their Own Right.—The first class comprises, or is defined to be “every male into whose line of relationship to the deceased no female enters,” *Siraj.* 10, 11.

These are again divided into three classes:—

1. Descendants.
2. Ascendants.
3. Collaterals, *Elb.* 51, or the offspring of the deceased, and his root, the offspring of his father, and the offspring of his grandfather.

Descendants.—The descendants are entitled to the residue in preference to all other classes of residuaries. They are the direct lineal male offspring of the deceased. Hence the nearest of the residuaries is the son; then the grandson, or son's son; the great-grandson, how low soever—the nearer always excluding the more distant, *Elb.* 51; *Siraj.* 10; *Bail. on Inh.* 73.

Ascendants.—The ascendants are entitled to succeed in default of all the descendants. They are the paternal lineal ancestors of the deceased, viz. the father, then the true grandfather, then the great-grandfather, how high soever—the nearer excluding the more remote.

Collaterals.—Next in succession are the collaterals, of whom the offspring of the father come first, viz. sons of the father, *i.e.* the full brother of the deceased; then the half-brother by the father; then the son of the full brother; then the son of the half-brother by the father; then their sons, how low soever, in the same manner the full being preferred to the half-blood at each stage of descent, *Siraj.* 40, 48, 49; then the offspring of the true grandfather, viz. the full paternal uncle of the deceased; then the half-paternal uncle by the father; then the son of the full paternal uncle; then the son of the half-paternal uncle by the father; then their sons, how low soever, in the same order. Then come the offspring of the great-grandfather, viz. the full paternal uncle of the father; then the half-paternal uncle of the father on the father's side; then the son of the father's full paternal

uncle ; then the son of the father's half-paternal uncle on the father's side ; then the paternal uncle of the grandfather ; then his son, how low soever, *Bail. Dig. M. L.* p. 691. In the following cases descendants of a great-grandfather have been found entitled to succeed as residuaries : *Banoo Beebee v. Iman Bukhsh*, 13 *D. A. Rep.* p. 68, *Cal.* ; *Sheikh Moohummud Bukhsh v. Shurf-oon-Nissa Begum*, *M. L. I.* p. 82 ; *Mohadeen Ahmud Khan v. Syed Mohamed*, *Mad. Jur.* 132, *post*, p. 44. It will have been observed that the nearest in degree in the above table is preferred to the more remote ; and of those in the same degree those of the whole blood are preferred to those of the half, *Elb.* 51 ; *Bail. on Inh.* 73. Thus, a son's son can never participate in the inheritance with a son, nor the father with either, as a residuary, though he is not excluded from his one-sixth as a sharer, *Bail. on Inh.* 73.

No Limit to Residuaries whether in Descent or Ascent.—Mr. Baillie (*Inheritance*, p. 76) says : In the right line, whether of ascent or descent, it is universally agreed that there is no limit to the persons who may be called to the succession, provided they are males, and connected with the deceased through males, according to the definition already given of the term residuary. I am disposed to think that with this qualification the succession of residuaries, in the collateral line, is equally unlimited. It must be admitted, however, that the learned author of the “ Principles and Precedents of Mahommedan Law ” seemed to entertain a different opinion, and that his opinion seems to be supported by the translator of the *Sirajiyah*. . . . The passage of the *Prins. and Prec.* in which the opinion that I have adverted to, seems to be contained, is as follows : “ When there is no son nor daughter, nor son's son nor son's daughter, however low in descent ; nor father, nor grandfather, nor other lineal male ancestor ; nor mother, nor mother's mother, nor father's mother, nor other lineal female ancestor ; nor widow, nor husband, nor brother of the half, or whole blood, nor sons, how low soever, of the brethren of the whole blood, or of those by the same father only ; nor sister of the half, or whole blood ; nor paternal uncle, nor paternal uncle's son, how low soever (all of whom are termed, either sharers or residuaries),

the daughter's children and the children of the son's daughters succeed, and they are termed the first class of distant kindred." * The text of the *Sirajiyyah* quoted by the author at the end of his book, and having the same number as the above passage, can have been intended only as an authority for the succession of the distant kindred. But it is here given entire, as translated by Sir W. Jones:—

“ A distant kinsman is every relation, who is neither a sharer, nor residuary. The generality of the Prophet's companions repeat a tradition concerning the inheritance of distant kinsmen, and according to this, our masters and their fellows have decided. The first class is descended from the deceased, and they are the daughters' children and the children of the sons' daughters.”—*Sir W. Jones*, vol. iii. p. 537. The only passage in the translation of the *Sirajiyyah* bearing directly on the point, that I am aware of, is the following, which does certainly seem to countenance the doctrine of the limitation of residuaries in the collateral line, to the descendants of the grandfather, though it is at the same time obviously inconsistent with the general definition of the term with which the paragraph commences. ‘ Now the residuary in his own right is every male in whose line of relation to the deceased no female enters, and of this sort there are four classes: the offspring of the deceased and his root, and the offspring of his father, and of his nearest grandfather, a preference being given—I mean a preference in the right of inheritance—according to proximity of degree. The offspring of the deceased are—his sons first, then their sons, in how low a degree soever; then comes his root or his father, then his paternal grandfather and their paternal grandfathers, then the offspring of his father or his brothers, then their sons, how low soever, and then the offspring of his grandfather, or his uncles, then their sons, how low soever.’ †

* Page 7, § 43 — There is an apparent inconsistency between this passage and the Preliminary Remarks, p. xi., where the author observes that “ the residuaries by relation are the sons and their descendants, the father and his descendants, *the paternal ancestor in any stage of ascent and his descendants.*” The words which I have underlined seem to comprehend the collaterals, however remote from the deceased.

† *Sir W. Jones*, vol. iii. p. 523.

There is nothing in the preceding quotation which cannot be reconciled with the definition of 'residuary' at its commencement, except the words 'nearest grandfather;' and we have, fortunately, the means of showing beyond dispute that these are an inadvertence of the translator. In the copy of the text annexed to the translation the vowel marks are inserted, and if these be correct, it is obvious that the words 'nearest' and 'grandfather' cannot agree together; and they are so distant from each other in the Calcutta edition, which contains both the text, and the commentary, printed together, that the commentator stops at the word 'grandfather' to make an observation on the sentence that concludes with it, before he suffers the reader to proceed to the next, which begins with the word 'nearest.'* The passage as it stands in the Calcutta edition, and stripped of the commentary, a part of which has slipped into the text of Sir W. Jones's copy, and may have given rise to the mistake in question, is literally as follows: 'And they are four classes—the offspring of the deceased and his root, and the offspring of his father, and the offspring of his grandfather; the nearest is nearest: I mean by this, that the first in the inheritance is the offspring of the deceased, or the sons, then their sons, how low soever, then his root, or the father, then the grandfather or father's father, how high soever,' &c. The reader will observe that the term grandfather is here taken in its proper comprehensive sense, to signify 'the lineal' male ancestor, however remote; and but for the word 'nearest,' the insertion of which I hope has been satisfactorily explained, there is nothing from which it can be gathered, that the term was to be taken in a less comprehensive sense, when the descendants of the grandfather are mentioned: It is true that these are described a little lower down as uncles; but the word in the Arabic which has been so translated, is one of equal comprehensiveness, being employed to designate, not only the father's brothers, but the brother of any male ancestor, however remote, provided he be connected with the deceased through males.

“It is to be observed, that if the enumeration of residuaries contained in the paragraph quoted from Mr. Macnagh-

* *Shureefecah*, App. No 149.

ten's work be complete, all relatives beyond the descendants of the grandfather are excluded, though they should fall within the general definition of the *Siraj*. In the following extract from the *Koodooree*, a book of very high authority in Arabia, and generally supposed to be the principal source from which the author of the *Hedaya* obtained the text of the law, on which his own work was a commentary, the enumeration of residuaries is carried one step farther—to the descendants of the great-grandfather. 'The nearest residuaries are the sons, then their sons, then the father, then the grandfather, then brothers, then their sons, then the sons of the grandfather, and they are paternal uncles; *then the sons of the father of the grandfather, and they are paternal uncles of the father.*' And to the same effect is the following extract from the *Futawa Siraj*:—"The nearest residuaries to the deceased in their own right are sons, then their sons, then the sons of their sons, how low soever; then the father, then the grandfather, or father's father, how high soever; then the full brother, then the half-brother by the same father, then the sons of the full brother, then the sons of the half-brother by the same father, then their sons in this manner, then the father's full brother, then the father's half-brother by the same father, then the sons of the father's full brother, then the sons of the father's half-brother by the same father, then their sons after this arrangement; *then the paternal grandfather's full brother, then the paternal grandfather's half-brother by the same father, then their sons after this arrangement.*" *

Collateral Residuaries amongst the Descendants of the Great-great-grandfather.—In the extract cited below from the *Futawa Alungeeree*, a work of perhaps the highest authority in India, as having been compiled under the orders of the Moghul government in its brightest period, the

* *Futawa Siraj*. App. No. 152. In the case of Doe d. Sheikh Mohammed Bukhsh v. Shurf-oon-Nissa Begum, Supreme Court, 1831, it was decided, in conformity with the above authorities, which were brought to the notice of the judges, and the *Futawa* of Molvee Morad, head Mahomedan officer of the Court, that the plaintiff, who was descended from the great-grandfather of the deceased, was entitled to a share of the residue.—*Ib. note.*

enumeration of residuaries, after proceeding in nearly the same terms as those of the last quotation, is carried one step higher, to the paternal uncles of the grandfather, that is to the descendants of the great-great-grandfather (*Futawa Alumgeeree*, App. No. 153). If these works are to be allowed any weight at all, it is clearly impossible that the limitation implied in the expression 'descendants of the nearest grandfather' can be correct; and there is nothing else, even in Sir W. Jones's translation of the passage previously quoted from the *Siraj.*, to restrict the meaning of the definition of the term residuary, with which the paragraph commences, the comprehensiveness of which is worthy of the reader's particular attention. 'Now the residuary in his own right' says the author, 'is every male* in whose line of relation to the deceased no female enters.'

In confirmation of the above argument, it has been held in the High Court at Madras, that descendants in the male line of the paternal grandfather of an intestate are within the class of residuary heirs, and are entitled to take, to the exclusion of the children of the testator's sisters of the whole blood, *Mohideen Ahmed Khan v. Sayyia Mohammed*, 1 Mad. II. C. R. 92.

And in the High Court at Calcutta it has been held, that descendants of a paternal grandfather's brother are entitled to rank amongst residuaries, and as such are preferable heirs to grand-daughters, *Syud Show Kat Ali v. Ahmud Ali*, 8 W. R. Civ. Rul. 39 Cal.

When there are several residuaries in the same degree, the property is divided amongst them *per capita*, and not *per stirpes*; e.g. when there is one son of one brother and ten sons of another, or one son of one paternal uncle and ten sons of another, the property is to be divided into eleven parts, of which each takes one, *Bail. Dig. M. L. 692*.

2. Residuaries by Another.—The second class by relationship are residuaries by another. They comprise every female who becomes, or is made, a residuary by a male who is parallel to her; in other words, they are certain females who, though entitled to legal shares in the absence of males

* See note, *Bail. Inh.* p. 83.

of the same degree, become residuaries with them. They are four in number, *e.g.*—

1. A daughter, who is made residuary by a son.
2. A daughter of a son, who is made residuary by a son of a son.
3. A full sister, who is made residuary by her brother.
4. A half-sister by the father, who is made residuary by her brother.—*Elb.* 51.

The remaining residuaries—*i.e.* all besides these—take the residue alone; *i.e.* the males take it without any participation of the females. These are four in number, *viz.*—

1. The paternal uncle.
2. His son.
- 3. The son of a brother.
4. The son of an emancipator.”—*Bail. Dig. M. L.* 693.

3. Residuaries with Another.—The third class comprises every female who becomes a residuary with another female, as full sisters, or half-sisters by the father, who become residuaries with daughters, or the sons of daughters, *ib.*

Residuaries of a Wulud-ooz-zina, and Son of a Moowalee.—Mr. Baillic, in the *Digest of M. L.*, p. 693, makes the following remarks under this head:—“The residuaries of a Wulud-ooz-zina, and the son of an imprecated woman, are the Moowalees or relatives of their mothers; for they have no father, and the *kurabut* or kindred of their mother inherit to them, and they inherit to them.* So that if the son of an imprecated woman should leave a daughter, a mother, and the imprecator, the daughter would take one-half, the mother one-sixth, and the remainder would revert to them, as if he had no father. If, besides these, there were also a husband, or a wife, he, or she would take his or her share, and the remainder be between the others, either as share, or as return. And if a person should leave his mother,

* It is conceived that this means that the kindred of the mother inherit to the Moowalees, and Moowalees inherit to the kindred of the mother.

a half-brother by the mother, and an imprecated son (of his father), the mother would take a third, the half-brother by the mother one-sixth, and the remainder would revert to them, there being nothing for the imprecated son, as the deceased has no brother, on the side of the father. When the child of a son of an imprecated woman dies, the family of his father inherit to him, being his brother's; but the family of his grandfather, who are his paternal uncle's, and their children, do not inherit to him. The same is true of the *Wulud-ooz-zina*, except that there is a difference between them in one case, which is, that the *tuwam*, or twin, of the *Wulud-ooz-zina* inherits only as a half-brother by the mother, while the twin of an imprecated son inherits as a full brother." *

Amongst Residuaries of different Kinds the Nearest is preferred.—When there are several residuaries of different kinds, as in the three classes referred to, preference is given to propinquity† to the deceased; so that the residuary with another, when nearer to the deceased than the residuary in his own right, is the first. Thus, when a man has died leaving a daughter, a full sister, and a son of a half-brother by the father, a half of the inheritance goes to the daughter, a half to the sister, and nothing to the brother's son, because the sister becomes a residuary with the daughter, and she is nearer to the deceased than his brother's sons. So, also, when there is, with the brother's son, a paternal uncle, the uncle takes nothing; and, in like manner, when in the place of the brother's son, there is a half-brother by the father, there is nothing for the half-brother, *Bail. Dig. M. L. 694.*

Residuaries by Special Cause.—A residuary by special cause is the emancipator, or emancipatrix of a freed man dying without residuary male heirs; the legal sharers, as well as females, being in this case specially excluded from inheritance, *Elb. 52.* This provision is, however, inoperative inasmuch as slavery has been abolished by the Legislature.

* "In a note the learned author observes that this passage is obscure, as it is difficult to conceive how one of twins should be imprecated without the other, and perhaps *tawan* means generally 'coupled or united,' it may mean here an ordinary brother or sister."

† Because strength of propinquity, or being the master of two propinquiries, is preferred to being master of one.—*Bail. In. p. 73.*

We have already seen that some of the persons (*see ante*, p. 24, 28, "Sharers") enumerated amongst the sharers, may become residuaries only, instead of sharers, or residuaries as well as sharers.

Table showing the Character of Residuaries.—The following table shows the character of residuaries, the circumstances under which they inherit, and the extent of the shares they take, *Siraj*. 4—12. •

- 1, **Sharer and Residuary.**—Where there are daughters, or daughters of a son, h. l. s., and no sons, the father takes the residue after their shares are satisfied, in addition to his own one-sixth share.
- 2, **Residuary.**—He has a simple residuary title on failure of children, or son's children, or other low descendants, • *Siraj*. 4 ; so that where there are sons, h. l. s., the father only takes his one-sixth share, and in default of them, he is residuary also. Thus, in the case of father, and two daughters, he takes his share first, the daughters take two-thirds, or four-sixths, and the remaining one-sixth goes to the father as residuary. Again, if there be no children or children of sons, how low soever, but a father and mother, he takes one-sixth, the mother one-third or two-sixths, and the father takes the other three-sixths, or one-half as residuary.
- 3, **True Grandfather** takes the father's share, assuming there is no intermediate true grandfather, both as residuary, and as sharer. But the grandfather is excluded by the father, if he be living, since the father is the mean of consanguinity, between the grandfather, and the deceased, *Siraj*. 4.
- 4, **Daughters.**—When there are sons, as well as daughters, the daughters take as residuaries, and the male has the share of two females, so that each daughter takes half as much as each son; so that where there are two sons and two daughters, each daughter will take one-sixth of the residue, instead of two-thirds between them, and each son two-sixths, or one-third.
- 5, **Son's Daughter.**—If there be two daughters of the

deceased, they take two-thirds, and there is none left for the son's daughter, unless there be in an equal, or in a lower degree with them, a boy who makes them residuaries; each male then takes the portion of two females, *Siraj*. 5. Take, for instance, two daughters, one son's daughter, and one son's son. The two daughters taking two-thirds, there is none left for the son's daughter; but she will take a third of the residue, and the son's son will take two-thirds. If, however, there were no son's son, the son's daughter would take nothing, and the daughters would take the residue by the Return.

When there is a son's daughter, and a son's son's daughter, but no daughter, the son's daughter takes one-half, and the son's son's daughter one-sixth.

- 6, **Sister.**—Brothers make the sisters residuaries, and each takes half as much as each male. If there are daughters, and son's daughters, and no brothers, the sisters take the residue after payment of the daughters', or son's daughters' shares, such residue being one-half, if only one daughter, or son's daughter, and one-third, should there be two or more, *Macn. Prin.* 25.

Sisters by the same father only take nothing where there are two or more full sisters; but if there be also brothers of the sisters by the same father only, the latter become residuaries, and each takes half as much as her brother by the same father only. Daughters, or son's daughters, make them residuaries like sisters.

CHAPTER IV.

DISTANT KINDRED.

Definition—Who are distant kindred—Absence of residuaries not sufficient to cause admission of—Come in according to the order of classes—Divisible into four classes—Order of succession: 1, Those descended from the deceased; 2, Those from whom the deceased is descended; 3, Those descended from the parents of the deceased; 4, Those descended from the two grandfathers, and two grandmothers of the deceased—Rules of preference amongst the individuals of each class—1st class, 2nd class, 3rd class, 4th class, 5th class, 6th class, 7th class—The succession of their children—Of the descendants of their children—Of those who succeed in default of distant kindred—Acknowledged kinsmen—Public treasury.

Definition—Who are.—On failure of all legal sharers, and residuaries, the inheritance is divided amongst the distant kindred, *Elb.* 52. They are, therefore, defined to be all those relatives who are neither sharers, nor residuaries, and they resemble residuaries in this, that where there is only one of them, he takes the whole property.

Absence of Residuaries not sufficient to cause Admission of.—The mere absence of residuaries would not of itself be sufficient to cause the admission of distant kindred; for, even if the property had not been exhausted by the sharers, the residue, by the doctrine of the return, would be divided amongst them, exclusive of the husband and wife, if any (see *The Return*, *post*, p. 100); so that the distant kindred in that case would really have nothing left for them.

Order of Succession—They come in, or succeed in the Order of their Classes.—If the distant kindred succeed in consequence of the absence of sharers, and residuaries, they come in, according to the order of their classes; unless, indeed, in case of the maternal grandfather, who comes after the third class, though nominally of a higher class, *Sirajiyyah*, 30. Thus the distant kindred of the second class cannot claim, so long as there are any of the first class. This rule is rigidly observed, so much so, that one of

the third class cannot inherit, even where he is nearer to the deceased, in the actual number of steps, than those of the first, and second class who may be living. Some writers, however, maintain that the second class are in the highest position. See *Sirajiyyah*, 29 ; *Bail. Dig. M. L.* 705.

Divisible into Four Classes.—Of the distant kindred there are four classes, vizt.:

1. The first class is descended from the deceased, and they are the children of daughters, and children of sons' daughters, how low soever, and whether male, or female, *Siraj.* p. 29 ; *Elb.* 52.

2. The second class are those from whom the deceased is descended—*i.e.* the excluded, or false grandfathers, how high soever, as the maternal grandfather, and his father, and the excluded, or false grandmothers, how high soever, as the mother of the maternal grandfather, and the mother of the maternal grandfather's mother, *Siraj.* 29 ; *Macn. Prin.* 44 ; *Elb.* 52.

3. Those descended from the parents of the deceased—*i.e.* the children of full, and half-sisters on the father's side, and daughters of full, and half-brothers, how low soever, and sons of half-brothers by the same mother only, how low soever, *Macn. Prin.* 45 ; *Elb.* 52. In the *Sirajiyyah*, p. 29, they are stated to be the sisters' children, and the brothers' daughters, and the sons of brothers by the same mothers only. Mr. Baillie, *Dig. M. L.* 705, enumerates them thus: Daughters of full brothers, and of half-brothers by the father, the children of half-brothers by the mother, and the children of all sisters.

4. The fourth class are those descended from the two grandfathers, and two grandmothers of the deceased—*i.e.* father's sisters, or paternal aunts of full, or half blood, and uncles by the same mother (*i.e.* half-brothers of the father on the mother's side), and maternal uncles, and aunts, and their children, *Macn. Prin.* 46 ; *Bail. In.* 128. In the *Siraj.* 29, they are enumerated thus: Paternal aunts, and uncles, by the same mother only, and maternal uncles, and aunts. These, and all who are related to the deceased through them are his distant kindred, *Siraj.* 29, *Macn.*

Prin. 47. Other authorities enumerate them thus : Paternal aunts, uterine paternal uncles, maternal uncles, and aunts, and consanguine, and uterine paternal aunts, and maternal uncles, and aunts, how distant soever their degree.

Rules of Preference amongst the Individuals of each Class.—The rules by which preference is given to the individuals of each of these classes are thus shortly stated :—

I. The Rule for the Succession of the Individuals of the First Class of distant kindred is, that they take according to proximity of degree, and when equal, those who claim through an heir, have a preference to those who claim through one who is not an heir. For instance, the daughter of a son's daughter, and the son of a daughter's daughter are equi-distant in degree from the ancestor; but the former shall be preferred by reason of the son's daughter being an heir, which the daughter's daughter is not. If there should be a number of these descendants of equal degree, and all on the same footing with respect to the persons through whom they claim, but the sexes of the ancestors differ in any stage of ascent, the distribution will be made with reference to such difference of sex, regard being had to the stage at which the difference first appeared; for instance, the two daughters of the daughter of a daughter's son will get twice as much as the two sons of a daughter's daughter's daughter, because one of the ancestors of the former was a male, whose portion is double that of a female, *Macn. Prin.* 49; *Sirajiyya*, 30, 31. So in the case of a daughter's son, and a daughter's daughter, the male will have a double share, for there is no difference of sex in the intermediate ancestors. But in the case of a daughter of a daughter's son, and the son of a daughter's daughter, the female will get the double portion, by reason of her father's sex, *Sirajiyya*, 31.

The opinion of Aboo Yoosuf is, that where the claimants are on the same footing with respect to the persons through whom they claim, regard should be had to the sexes of the claimants, and not to the sexes of their ancestors; but this, although the most simple, is not the most approved rule, *Macn. Prin.* 49, note.

II. For the Succession of the Second Class.—The succession also with regard to the second class of distant kindred is regulated nearly in the same manner, by proximity, and by the condition, and sex of the person through whom the succession is claimed, when the claimants are related on the same side; when the sides of relation differ, two-thirds go to the paternal, and one-third to the maternal side, without regard to the sex of the claimants, *Macn. Prin.* 50; *Sirajiyya*, 35.

The rule may be thus exemplified: The claimants being a maternal grandfather, and the mother of a maternal grandfather, the former, being more proximate, excludes the latter; but suppose them to be the father of a maternal grandfather, and the mother of a maternal grandfather: here the claimants are equal in point of proximity; the side of their relation is the same, and they are equal with respect to the sex of the person through whom they claim; in this case the only method of making the distribution is, by having regard to the sexes of the claimants, and by giving a double share to the male, *Macn. Prin.* 50, *note*.

III. For the Succession of the Third Class.—The same rules apply with regard to the third as to the first class of distant kindred. A person descended from a residuary is preferred to one not so descended; for instance, the brother's son's daughter, and the sister's daughter's son are equi-distant in degree from the ancestor, but the former shall be preferred by reason of the brother's son being a residuary heir; and where they are equal in this respect, the rule laid down for the first class is applicable to this, *Macn. Prin.* 51.

IV. For the Succession of the Fourth Class.—With regard to the fourth class, all that need be said is, that (the sides of the relation being equal) uncles, and aunts of the whole blood are preferred to those of the half, and those who are connected by the same father only, are preferred to those by the same mother only, whether they be males, or females. Where the strength of relation is also equal—as, for instance, where the claimants are a maternal uncle, and a maternal aunt of the whole blood—then the rule is, that the male shall have a share double that of the female. Where one claimant is related through the father only, and the

other is related through the mother only, the claimant related through the father shall exclude the other, if the sides of their relation are the same: for instance, a maternal aunt by the same father only, will exclude a maternal aunt by the same mother only; but if the sides of their relation differ—for instance, if one of the claimants be a paternal aunt by the same father, and mother, and the other be a maternal aunt by the same father only—no exclusive preference is given to the former, though she obtains two shares in virtue of her paternal relation, *Macn. Prin.* 52; *Sirajiyah*, 39, 40.

Each of these classes excludes the next lower. The rules are so intricate and puzzling it can hardly be expected that the student will understand them without some trouble and care. The following rules, which may be deduced from them, will help the memory and tend to their elucidation.

1. In the first, second, and third classes the nearer in degree to the deceased is preferred to the more remote.

2. If several of an equal degree are entitled to succeed, the property is divided equally amongst them, if they are of the same sex. If of different sexes, in general, each male will take a double share. But where the persons through whom they are related to the deceased are of different sexes in the first, second, and third classes, regard must be had to the sexes of the intermediate relatives, and not to those of the actual claimants. Thus, where the deceased leaves a daughter's son, and a daughter's daughter, the male will take a double share, there being no difference of sex in the intermediate ancestors. But where the deceased leaves a daughter of a daughter's son, and a son of a daughter's daughter, the female will get the double portion on account of her father's sex.

3. In classes 1 and 2, a person descended from an heir is preferred to one not so descended.

So in class 3 a person descended from a residuary is preferred to one not so descended.

4. In the second class, two-thirds go to the paternal side, and one-third to the maternal, if there are sets of claimants on both sides.

5. In the 4th class the whole blood is preferred; and

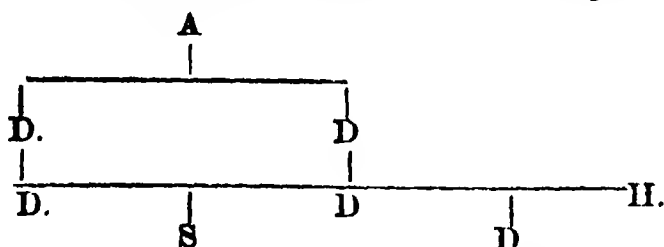
those who are connected by the father only, are preferred to those connected by the mother only, without regard to sex.

6. The rule as to whole blood does not apply when the claimants are on different sides, *e.g.* a maternal aunt of the whole blood will not exclude an uterine paternal aunt, but, on the contrary, she will take a double share on account of her relationship through the father.

Upon 3rd class Mr. Baillie, *Dig. M. L.* 706, says: "If the claimants are equal in proximity to the deceased, and there is no child of an heir amongst them, the property is to be equally divided amongst them, if they are all males, or all females; and if there is a mixture of males, and females, then in the proportion of two parts to a male, and one to a female. This is without any difference of opinion when the sex of the ancestors, whether male or female, is the same. But when the ancestors are of different sexes, though, according to Aboo Yoosuf, the division is to be made in the same way, yet, according to Mahommed, it is only the number that is to be taken from the individual claimants, and the quality of the sex is to be taken from the generation in which the difference of sex first appears. Thus, if one should leave the son of a daughter, and a daughter of a daughter, the property is to be divided amongst them in the proportion of two shares to the male and one to the female, because, here the sex of the ancestors is the same; but if he should leave the daughter of a daughter's daughter, and the daughter of the son of a daughter, the property would be divided amongst them in halves, according to Aboo Yoosuf, regard being had merely to the number of the individuals; while according to Mahommed it would be divided amongst them in thirds—two-thirds to the daughter of the son of a daughter, and one-third to the daughter of the daughter's daughter."

Mr. Baillie says upon the fourth rule, if one of the claimants is connected with the deceased, in two, or more ways, he will inherit by each way, regard being had to the branches, according to Aboo Yoosuf, and to the roots according to Mahommed; except the grandmother, who, according to Aboo Yoosuf, can inherit only in one way.

Thus, suppose a man to have left two daughters, who have died, one leaving a son and the other a daughter, and suppose this son, and daughter to intermarry, and to have a son, after which the daughter marries another man, to whom she bears a daughter. Her first child is thus the son of a daughter's son and also the son of a daughter's daughter, while her second child is only the daughter of a daughter's



daughter, according to the
scheme in the margin.

Now, suppose the husband
and wife, and the grand-

mothers to be dead, and the question to relate to the estate of the grandfather: according to Aboo Yoosuf, the son would take four-fifths, and the daughter one-fifth, *i.e.* a double share as a male, and that doubled by reason of his being connected in two ways; whilst, according to Mahomed, the son would take five-sixths and the daughter only one-sixth—*i.e.* Mahommed would make the division according to the sexes in the second generation, where the distinction first appears, giving two-thirds, or four-sixths to the grandson, which would pass wholly to his son, and leaving the remaining third, or two-sixths for the granddaughter, which would be equally divided between her son by the first marriage, and her daughter by the second, *Bail. Dig. M. L. 707.*

Macnaghten says, “In considering the doctrine of succession of distant kindred, attention must be paid to the following points:—1st. Their relative distance in degree of relation from the deceased; whether a greater, or less number of degrees removed. 2nd. It must be ascertained whether any of the claimants are the children of heirs. If so, preference must be shown to such children. 3rd. Their strength of relation; whether they are of the half, or whole blood. 4th. Their sides of relation; whether connected by the father’s, or mother’s side. 5th. The sexes of the persons through whom they claim, whether male, or female. With respect to this latter point, however, a difference of opinion exists; it being maintained by some authorities that, *cæteris paribus*, no regard should be had to the mere sex of the person

through whom the claim is made, but that the adjustment should be made according to the sex of the claimants themselves. But the contrary is the more approved doctrine. It should be recollected, too, that whenever the sides of relation differ, those connected through the father, are entitled to twice as much as those connected through the mother, whatever may be the sexes of the claimants, *ib. note*.

For the Succession of their Children.—After the fourth class their children, or descendants come in, *i.e.* the cousins. Their succession is regulated by the following rules:—Propinquity to the ancestor is the first rule. Where that is equal, the claimant through an heir inherits before the claimant through one who is not an heir, without respect to the sex of the claimants; for instance, the daughter of a paternal uncle succeeds in preference, to the son of a paternal aunt—unless, the aunt is related on both the father's, and mother's sides, and the relation of the uncle be by the same mother only. But where the son of a paternal aunt by the same father, and mother, and the son of a maternal aunt by the same father, and mother, or by the same father only, claim together, the latter will not be excluded by the former. The only difference is, that two-thirds are the right of the claimant on the paternal side, and one-third that of the claimant on the maternal side. Should there be no difference between the strength of relation, the sides, or the sexes of the persons through whom they claim, regard must be had to the sexes of the claimants themselves, *Macn. Prin.* 53; *Sirajiyya*, p. 40.

For the Succession of the Descendants of their Children.—In the distribution amongst the descendants of this class, the same rule is applicable as to the descendants of the first class. For instance, the two daughters of the daughter of a paternal uncle's own son, will get twice as much as the two sons of the daughter of a paternal uncle's daughter, supposing the relation of the uncles to be the same; and in the case of equality in all other respects, regard must be had, as above, to the sexes of the claimants, *Macn. Prin.* 54.

Of those who Succeed in default of Distant Kindred.—

In default of kindred, he has a right to succeed whom the deceased ancestor acknowledged, conditionally or unconditionally, as his kinsman; provided the acknowledgment was never retracted, and provided it cannot be established that the person in whose favour the acknowledgment was made, belongs to a different family, *Macn. Prin.* 55.

Of the Public Treasury.—In default of all these, there being no will, the property will escheat to the public treasury; but this only where no individual has the slightest claim, *Macn. Prin.* 56.

CHAPTER V.

PRIMARY RULES OF DISTRIBUTION.

Rules where the shares are a half and a fourth—A half and an eighth—A half, a fourth, and an eighth cannot occur together—A sixth and a third—A sixth and two-thirds—A third and two-thirds—A sixth, a third, and two-thirds cannot occur together—A half with a sixth, a third, or two-thirds—A fourth with a sixth, a third, and two-thirds—An eighth with a sixth, a third, or two-thirds—Of the increase of six—Of twelve—Of twenty-four.

Rule where the Shares are a Half and a Fourth.—Where there are two claimants, the share of one of whom is half, and of the other a fourth, the division must be made by four; as in the case of a husband, and an only daughter, the property is made into four parts, of which the former takes one, and the latter two. The remaining fourth will revert to the daughter, *Macn. Prin.* 57.

A Half and an Eighth.—Where there are two claimants, and the share of one of whom is half, and of the other an eighth, the division must be made by eight; as in the case of a wife, and a daughter, the property is made into eight parts, of which the daughter takes four, and the wife one. The surplus three shares revert to the daughter, *Macn. Prin.* 58.

A Half, a Fourth, and an Eighth cannot occur together.—No case can occur of two claimants, the one entitled to a fourth, the other to an eighth; nor of three claimants, the one entitled to half, the other to a fourth, and the third to an eighth, *Macn. Prin.* 59.

A Sixth and a Third.—Where there are two claimants the share of one of whom is one-sixth, and of the other one-third, as in the case of a mother, and father being the only claimants, the property is made into six parts, of which the mother takes two, and the father one as his legal share. The surplus three shares revert to the father, *Macn. Prin.* 60.

A Sixth and Two-thirds.—Where there are two claimants, the share of one of whom is a sixth and of the other two-thirds, as in the case of a father, and two daughters being the only claimants, the property is made into six parts, of which the father takes one as his legal share, and the two daughters four. The surplus share reverts to the father, *Macn. Prin.* 61.

A Third and Two-thirds.—Where there are two claimants, the share of one of whom is a third, and of the other two-thirds, as in the case of a mother, and two sisters, the property is made into three parts, of which the mother takes one, and the two sisters two, *Macn. Prin.* 62.

A Sixth, a Third, and Two-thirds cannot occur together.—No case can occur of three claimants, one entitled to a sixth, another to a third, and the other to two-thirds, *Macn. Prin.* 63.

A Half with a Sixth, a Third, or Two-thirds.—Where a husband inherits from his childless wife (his share in this case being one-half), and there are other claimants entitled to a sixth, a third, or two-thirds, such as a father, a mother, or two sisters, the division must be by six, *Macn. Prin.* 64.

A Fourth with a Sixth, a Third, or Two-thirds.—Where a husband inherits from his wife, who leaves children, or a wife from her childless husband (the shares of those persons respectively in such cases, being one-fourth), and there are other claimants entitled to a sixth, a third, or two-thirds, the division must be by twelve, *Macn. Prin.* 65.

An Eighth with a Sixth, a Third, or Two-thirds.—Where a wife inherits from her husband, leaving children, her share in that case being one-eighth, and there are other claimants entitled to a sixth, a third, or two-thirds, the division must be by twenty-four, *Macn. Prin.* 66.

Of the Increase of Six.—Where six is the number of shares into which it is proper to distribute the estate, but that number does not suit to satisfy all the sharers without a fraction it may be increased to seven, eight, nine, or ten, *Macn. Prin.* 67.

Of Twelve.—Where twelve is the number, and it does not suit, it may be increased to thirteen, fifteen, or seventeen, *Macn. Prin.* 68.

Of Twenty-four.—Where twenty-four is the number, and it does not suit, it may be increased to twenty-seven, *Macn. Prin.* 69.

CHAPTER VI.

RULES OF DISTRIBUTION AMONGST NUMEROUS KINDRED.

Observations.—Seven principles of distribution—Equal numbers—Concordant—Composite—Prime.

It has been objected to the following rules, that Mr. Macnaghten, in the “Principles of Mahommedan Law,” works out these examples according to the ancient and cumbrous methods adopted by Mahommedan jurists, when the same results may be obtained by the more simple process of English arithmetic. Although the English system may have the advantage over the Mahommedan, in point of simplicity, we cannot help thinking that Macnaghten, on the whole, was wise in adhering to the Mahommedan system : he was writing for Mahommedan lawyers, who were in the habit of consulting the ancient works, and had familiarised themselves with the system adopted by their jurists, and they would have been even more puzzled with our system of calculation, than we are by theirs ; and as a Treatise on Mahommedan law will have almost exclusive circulation among native lawyers, we think

it more advisable to make the calculations in the form they approve, than perplex them with what they would consider new-fangled ones. With that view we will follow Macnaghten, particularly, as the rules are established as principles, and each rule prescribes the mode of working out the result; and those who work out the rules by the English system of arithmetic, do not adhere to those rules, although the same result may be attained. There may, indeed, become a time when education is extended sufficiently amongst the natives of India as to make them familiar with our system of arithmetic; when that time has arrived it will be soon enough to alter their system, and adopt a new one.

Seven Principles of Distribution.—In arranging cases there are seven rules of distribution, the first three of which depend upon a comparison between the number of heirs, and the number of the shares, *i.e.* between the persons, and the shares; and the four remaining ones upon a comparison of the numbers of the different sets of heirs, after a comparison of the number of each set of heirs, with their respective shares, *i.e.* between persons and persons, *Siraj.* p. 17; *Macn. Prin.* 74.

Equal Numbers.—Numbers are said to be *mootumasil*, or equal, where they exactly agree, *Macn. Prin.* 70.

Concordant.—They are said to be *mootudakhil*, or concordant, where the one number being multiplied, exactly measures the other, *Macn. Prin.* 71.

Composite.—They are said to be *mootuwafiq*, or composite, where a third number measures them both, *Macn. Prin.* 72.

Prime.—They are said to be *mootubayun*, or prime, where no third number measures them both, *Macn. Prin.* 73.

1ST PRINCIPLE.

Of a sister with a son of a paternal uncle—Of a daughter with a brother's son—Of a husband with a brother's son, the wife having been separated without a divorce—Of a daughter's son and a daughter's daughter of a son with a husband and daughter—Of a brother with a widow—Of a paternal uncle's son with a widow—Sister's sons are distant kindred—Of two sisters with a son's daughter—Of legal sharers and residuaries with distant kindred—Of a widow with four daughters and a brother's son—

Of a husband with a maternal uncle—Of a daughter with a husband and a paternal uncle—Of a son with a mother and husband—Of a paternal half-uncle with a maternal uncle—Of a mother with a paternal half-uncle—Of a daughter with a half-brother—Of a son and three daughters.

First Principle.—The first is when, on a comparison of the number of the heirs, and the number of shares, it appears that they exactly agree, there is no occasion for any arithmetical process. Thus, where the heirs are a father, a mother, and two daughters (*Siraj*. p. 17), the shares of the parents are a sixth each, and that of the daughters two-thirds. Here, according to Principle 61 (*ante*, p. 58), the division must be by six, of which each parent takes one, and the remaining four go to the two daughters, *Macn. Prin.* 75.

Of a Sister with a Son of a Paternal Uncle.—The proprietor of an estate sold six shares during his lifetime, and left the remaining ten shares to devolve on his heirs, who were a son of a paternal uncle, and a sister. Those ten shares will be divided equally, the sister taking five shares and the son of the paternal uncle, the same number. See *Macn. Prin.* 23, p. 32, and *First Prin. of Dis.* (75), *supra*; *Macn. Prec.* 119, Cas. xlvii.

Of a Daughter with a Brother's Son.—A woman dies, leaving a daughter, and a brother's son her only surviving heirs. Her property, in that case, will be equally divided between her daughter, and her brother's son. Half will go to the daughter as her legal share (*Prin.* 16, *ante*, p. 30), and the other half to her brother's son as residuary, *First Prin. of Dis.* (75) *supra*; *Macn. Prec.* Cas. xlv.

Of a Husband with a Brother's Son, the Wife having been Separated without a Divorce.—A man turned his wife away for misconduct. She maintained herself by her own exertions for four years. On her death she left her husband, and her brother's son.

If the husband divorced his wife at the time of separation, the only legal claimant to her property will be her brother's son; but if he merely turned her away without a divorce, her coverture still continues, and on her death her husband, and her brother's son will succeed to her estate jointly. They

will each be entitled to one moiety, the husband to half (*Prin.* 15, *ante*, p. 33) as his legal share, and the brother's son to the other half as residuary, *First Prin. of Dis.* (75) ; *ante*, p. 61, *Macn. Prec.* p. 118, *Cas.* xliii.

Of a Daughter's Son and a Daughter's Daughter.—A proprietor of land being in joint possession thereof, with the son of his daughter, obtained a formal grant of the property in the name of himself, and his said grandson. Afterwards his daughter died, leaving a son (grandson of the said proprietor), a daughter, a husband of that daughter, and her own husband. Afterwards the said proprietor died, and for a long time no tidings were heard of the grandson, who had travelled into a distant country. The grand-daughter of the proprietor next died, leaving a son, a daughter, and a husband. After her, the son-in-law of the proprietor died, leaving a son by a second wife.

The right and title to the land will be solely vested in the original proprietor, notwithstanding he may have obtained the formal grant in the joint names of himself, and grandson, because, the law pays respect to persons, not to names. If his daughter die before him, she will be excluded from all participation in the property. If the proprietor die leaving a daughter's son, a daughter's daughter, a daughter's husband, and the husband of a daughter's daughter, in that case the property will be divided into three shares, of which his grandson will obtain two shares, and his granddaughter one. The husbands of the daughter, and of the daughter's daughter are not entitled to any share.

An absentee, concerning whose death, place of abode, or existence no tidings can be learned, is, as regards his own property, alive, and as regards that of others, defunct, the ruling power should appoint some one to take charge of his affairs, and his portion should be reserved for the period of ninety years from the absentee's birth. Any of his relations who die in this interim will not participate in his property, *Macn. Prec.* *Cas.* xlii. p. 116, *ante*, p. 17.

Of a Son with a Husband, and Daughter.—Supposing the granddaughter to die, leaving a son, a daughter, and a husband, her property will be made into four parts, and distri-

buted amongst her heirs, in the following manner : one share will go to her husband, two to her son, and one to her daughter ; and if the original proprietor's son-in-law died possessing property distinct from that of such proprietor, it will devolve on his son, *First Prin. of Dis.* (75, *ante*, p. 61) ; *Macn. Prec. ib.* 116.

Of a Brother with a Widow.—A person dies leaving as his heirs a widow, and a brother. The property will be divided into four parts, of which the widow will take one, as her legal share, and the brother the remaining three, as residuary, *Macn. Prec.* p. 112, *Cas.* xxxviii.

This is an example of distribution (75 *First Prin. ante*, p. 61) where the parties receive their shares without a fraction ; a fourth (agreeably to *Prin.* 14, *ante*, p. 33) being the share of a widow. When there are no children, the property must be made into four parts, of which she takes one, and the residuary heir, the remainder, *ib. note*.

Of a Paternal Uncle's Son with a Widow.—A man leaves a widow, a son of his paternal uncle, two sons of his sister, three daughters of his sister, and six grandsons of his paternal uncle. After defraying the funeral expenses of the deceased, the liquidation of his debts, and the payment of legacies left by him, to the extent of a third of the property, the estate will be made into four parts, of which the widow will take one part as her legal share (see *Prin.* 14, *ante*, p. 33), and the remainder will go to the son of the paternal uncle as residuary, *Macn. Prec.* p. 111, *Cas.* xxxvi.

Sister's Sons are Distant Kindred.—The grandsons of the paternal uncle will be excluded by reason of the intervention of their father and others, and rank among the distant kindred only (*Macn. Prin.* 45, *ante*, p. 50) ; therefore they take no share of the inheritance, *ib.*

This case is an example of the first principle of distribution (75, *ante*, p. 61). Where there are no children the share of a widow is one-fourth. The property must consequently be made into four parts, of which the widow takes one, as her legal share, and the remainder goes to the son of the paternal uncle without a fraction, *ib. note*.

Of Two Sisters with a Son's Daughter.—A woman died leaving property obtained from her husband in satisfaction of dower, and two sisters, and a daughter of a son who died during her lifetime. The property, however obtained, should be divided into four parts, of which the daughter of the deceased woman's son is entitled to a moiety (see *Prins.* 18, *ante*, p. 30 and 25, *ante*, p. 48), or eight annas in the rupee, and the sisters will take the remaining moiety, that is, one quarter, or four each, *First Prin. of Dis.* (75), *ante*, p. 61; *Macn. Prec.* p. 110, *Cas.* xxxiii.

Of Legal Sharers and Residuaries with Distant Kindred.—A. left a mother,* two paternal half-grand-uncles, and two daughters of a paternal grand-uncle, who claimed his estate. The mother is a legal sharer, and the paternal half-grand-uncles are residuaries, and are therefore the heirs of the deceased. The daughters of the paternal grand-uncle are amongst the distant kindred,† who can never take any part of the property, so long as a legal sharer, or a residuary remains, *Macn. Prec.* 109, *Cas.* xxxii.

The mother's share in this case would be a third (see *Prin.* 34, *ante*, p. 31). The remaining two-thirds would go to the grand-uncles as residuaries, and the estate would be divided into three parts without a fraction, furnishing an example of the *First Prin. of Dis.* (75, *ante*, p. 61); *Macn. Prec.* p. 110, *Cas.* xxxii. *note.*

Of a Widow with Four Daughters and a Brother's Son.—A, and B, two brothers, inherited equally their patrimonial estate. A died, leaving a son C, who died, leaving a son D. B then died, leaving a widow, and four daughters. The widow since died. A died before B, and B died before D. All the property of A will, on his death, go to his son C, and, on his death, to his son D. Of the property left by B, an eighth will go to his widow, and two-thirds to his daughters, as their legal shares. D will be entitled to the rest, as residuary. Thus B's property will be divided into twenty-four parts, of which the widow will be entitled to an eighth, or three parts, the daughter to two-thirds, or

* In the case it is stated "brother."

† See *Prin.* (47, *ante*, p. 50).

sixteen, and the brother's son, or grandson, to the remaining five parts. The widow having died before the distribution, her share will be taken by her daughters, *Macn. Prec.* p. 113, Cas. xxxix.

When the portion of one set of sharers is one-eighth, and that of another set of sharers two-thirds (as in this case), or one-third, or one-sixth, the rule is that the estate must be made into twenty-four parts, *Macn. Prin.* 66, *ante*, p. 59. This is an example of the first *Principle of Distribution* (75, *ante*, p. 61), all the heirs getting their portions without a fraction.

Of a Husband with a Maternal Uncle.—A woman died, leaving a daughter who succeeded to the whole estate of the mother. The daughter died childless, leaving a husband, and a maternal uncle. The mother having left a brother, as well as a daughter, the latter was entitled to only one moiety of the property; the other moiety belonging of right to the deceased's brother, he being a residuary heir. On the death of the daughter without issue, her share will be made into two parts, one of which will go to her husband, as his legal share, and the remaining moiety (if there be no other sharers, nor residuaries) to her maternal uncle, who is enumerated amongst the fourth class of the distant kindred, *Macn. Prec.* p. 111, xxxv.; *First Prin. of Distribution*, (75); *ante*, p. 61, see *Prins.* 46, *ante*, p. 50.

Of a Daughter with a Husband and a Paternal Uncle.—Where a woman died leaving as her heirs a husband, a daughter, and a paternal uncle. The property will be divided into four parts; of which the husband will take one, or a fourth, as his legal share; the daughter two, or a moiety, as her legal share; and the paternal uncle the remaining one, as residuary, *Macn. Prec.*, p. 111, Cas. xxxiv.; *First Prin. of Distribution* (75, *ante*, p. 61).

Of a Son with a Mother and Husband.—A woman died, leaving a husband, an infant son, a mother, and a sister. The mother of the deceased woman sued her son-in-law for her maternal shares of the dower to which her daughter was entitled. The mother has a right to the maternal share of her daughter's dower; and the entire sum due on

that account should be distributed into twelve portions, of which three shares (a fourth, *Prin.* 15, *ante*, p. 33), belong to the husband, two (a sixth) to the mother (*Prin.* 33, *ante*, p. 31), and seven to the infant son. The son excludes the sister, *Prin.* 21, *ante*, p. 32; *Macn. Prec.* p. 114, Cas. xl.

This case is an example of the first *Prin. of Distribution* (75, *ante*, p. 61). Where a fourth and a sixth share occur together (see *Prin.* 65, *ante*, p. 58), the division must be by twelve; and this arrangement suiting to satisfy all the legal claimants, there is no occasion for any further process, *Macn. Prec.* p. 114, Cas. xl. *note*.

Of a Paternal Half-Uncle with a Maternal Uncle.—A husband died, leaving two wives. By the first, he has one son, by the second, two. The former died, leaving a wife, and two sons. Supposing the deceased son to have assigned over all his property in dower to his wife, has the brother of the wife, on her death and that of her two sons, a right to inherit the property so settled upon her in satisfaction of dower, or is he entitled to any share of it? and supposing the deceased son not to have assigned his property in dower, but that his widow was in possession of her husband's legal share, has her brother a right to any share of it on her husband's death?

If a person, having assigned over all his property to his wife in satisfaction of dower, die, leaving her, and two sons, and the sons die before their mother, and she die leaving a brother, that brother will be legally entitled to all the property left by her. But if she die before her sons, or before one of her sons, and those sons die leaving their paternal half-uncle, or his sons, and their maternal uncle, under these circumstances the paternal half-uncle, or his sons, will be entitled to the property left by them, by reason of their right as residuaries; and the maternal uncle, who is amongst the distant kindred, will not be entitled to anything. Supposing the deceased not to have assigned to his wife his property in dower, but that she was in possession of an eighth share thereof (which was her legal right, the remainder belonging to her sons), and that she died before her sons, then her eighth share will devolve upon them, and on

their death will go to their paternal half-uncle, or his sons. The maternal uncle will not be entitled to any part of it. *Macn. Prec.* 114, Cas. xli.

Of a Brother with a Mother and his Brother.* — If one of the sons die, leaving his mother and his brother, his property will be made into three shares, of which his mother will get one, and his remaining brother two.

Of a Mother with a Paternal Half-uncle.—And if the other son die, leaving his mother, his paternal half-uncle, or sons of that uncle, his property will be made into three shares; of which one will go to the mother, and the other two to the paternal half-uncle or his sons, in virtue of their residuary claims. If after that the mother die, leaving only her brother, her whole property will devolve upon him. The succession of these persons severally to the vested interests cannot be stated, it not having been ascertained which of them survived longest, *Macn. Prec.* 114, Cas. xli.

Of a Daughter with a Half-brother.—A person died leaving an only daughter and the son of a half-brother by the same father only. Assuming that the daughter and half-brothers are the sole claimants, his estate will be made into four parts; of which the daughter will take two parts, or half, as her legal share, and the other half will go to the half-brother as residuary, on whose death his son will succeed to it, *Macn. Prec.* p. 108, Cas. xxx.

According to *Prin.* 16, *ante*, p. 30, the daughter takes a moiety; and there being only one residuary heir, who takes the other moiety without a fraction, this case affords an example of the first *Prin. of Distribution* (75), *ante*, p. 61; *Macn. ib. note*.

Of a Son and Three Daughters.—Where a man died, leaving a son and three daughters, who marry after his death, the property will be divided into five shares; of which the son will get two (*Prin.* 3, *ante*, p. 30, 47), and the daughters three, or one each, *Macn. Prec.* 118, Cas. xliv.

This is an example of the first *Prin. of Distribution*, *ante*, p. 61.

* See *Macn. Prin.* 33 and 34, *ante*, p. 33, and note to *Prec.* p. 115.

2ND PRINCIPLE.

*Where the portions of one class are fractional —Mootuwafiq—
Father, mother, and ten daughters.*

Second Principle.—The second is when, on a comparison of the number of the heirs, and the number of shares, it appears that the heirs cannot get their portions without a fraction, and that some third number measures them both, when they are termed *mootuwafiq*, or composite; as in the case of a father, mother, and ten daughters. Here, according to *Prin.* 61, *ante*, p. 58, the division must be by six. But when each parent has taken a sixth, there remain only four to be distributed among the ten daughters, which cannot be done without a fraction; and on a comparison of the number of heirs who cannot get their portions without a fraction, and the number of shares remaining for them, they appear to be composite, or agree in two. In this case the rule is, that half the number of such heirs, which is five, must be multiplied into the number of the original division, six. Thus: $5 \times 6 = 30$, of which the parents take ten, or five each, and the daughters twenty, or two each, *Macn. Prin.* 76.

In the *Sirajiyyah*, p. 17, it is said: “If the portions of one class be fractional, yet there be an agreement between their portions and their persons, then the measure of the number of persons whose shares are broken, must be multiplied by the root of the case, and its increase, if it be an increased case—as if a woman leave a husband, both parents, and six daughters, or a man leave both parents and ten daughters.”

3RD PRINCIPLE.

Of a brother's son with two widows—Of four daughters with a brother, two sisters, and a widow—Of a widow with a mother, brother, and three sisters—Of two daughters with a son's sons and a son's daughter—Of three sons with two daughters and a widow—Of a sister with a widow and four brothers' sons—Of a widow with an only daughter and two paternal uncles—Of a widow with two sons and two daughters—Of two sons with a mother and a widow—Of a daughter with a husband and two brothers—Of two sons with a widow—Of a son with a widow and two daughters—Of a husband with children—Of two sons with a mother—Of two sons with a widow and a daughter.

Third Principle.—The third is when, on a comparison of

the number of the heirs, and the number of shares, it appears that the heirs cannot get their portions without a fraction, and that there is one over and above, between the number of such heirs, and the number of shares remaining for them. This is termed *mootubayun*, or prime, as in the case of a father, a mother, and five daughters. Here also according to *Prin.* 61, *ante*, p. 58, above quoted, the division must be by six. But when each parent has taken a sixth, there remain only four to be distributed amongst the five daughters, which cannot be done without a fraction ; and on a comparison of the number of heirs, who cannot get their portions without a fraction, and the number of shares remaining for them, they appear to be *mootubayun*, or prime. In this case the rule is that the whole number of such heirs, which is five, must be multiplied into the number of the original division. Thus : $5 \times 6 = 30$, of which the parents take ten, or five each, and the daughters twenty, or four each, *Macn. Prin.* 77.

The *Sirajiyyaḥ* says, p. 17, that “ If their portions leave a fraction, and there be no agreement between those portions, and the persons, then the whole number of the persons whose shares are broken must be multiplied into the root of the case—as, if a woman leave her husband and five sisters by the same father and mother.”

Of a Brother's Son with two Widows.—Where a person died childless, leaving two widows and a brother's son, after the death of the first widow, the second, during the lifetime of the brother's son of her deceased husband, sold the property. On the death of the childless person, his property, after defraying his necessary expenses, should have been distributed among his two widows, and his brother's son, according to their legal shares—that is to say, into eight shares, of which the widows should take a fourth, or two between them, and the remaining six should go to the brother's son, as residuary.

The sale by the second widow after the death of the first is only valid for her own shares, and not for the share which appertained to the first widow, nor for the six shares which are the right of the brother's son, who is proprietor of his own share.

On the death of the first widow, if she had not disposed of her share by gift, or sale, and if she did not leave any legal heir, her share would go to the public treasury, *Macn. Prec.* p. 123, Cas. liii.

This is an example of the third *Prin. of Distribution* (77, *ante*, p. 68). To give the widows their fourth share, to which they are entitled, the property must have been made originally into four parts; but one (the fourth part of that number) cannot be divided between the two widows without a fraction; and, on a comparison of the number of heirs so situated, and the share allowed to them, they appear to be *mootubayun*, or prime. Thus: $1 = 2 - 1$; in which case the rule is, that the number of the original division must be multiplied by the number of heirs who cannot get their portion without a fraction. Thus: $4 \times 2 = 8$, *ib. note*.

Of Four Daughters, with a Brother, Two Sisters, and a Widow.—Where a person possessed of landed property, which he had obtained by gift, died, leaving a widow, four daughters, a brother, and two sisters—his brother also died, leaving four sons, and one of his sisters died, leaving a daughter—the widow disposed of part of the property by sale.

It appeared that the widow had been in possession of her husband's property from the time of his death, and had disposed of a part of it by sale. The claimants came forward urging their right of inheritance to the estate of the deceased proprietor, and they admitted that the person in possession is his lawful widow. Now, according to the usage of this part of the country (Burdwan), the dower is never fixed at an amount falling short of 650 rupees, and, from the smallness of the estate, it is incredible that this sum should have been realized therefrom. The claim of inheritance cannot be maintained until the debt due on account of dower shall have been liquidated. Supposing this to have been done, the estate should have been distributed among the immediate heirs of the original proprietor in the following manner: It should be made into ninety-six parts, of which the widow should receive an eighth part (see *Prin.* 14, *ante*, p. 33), or twelve shares, the daughters two-thirds (see *Prin.* 17, *ante*,

p. 30) or sixty-four shares, the brother ten shares, and each of the sisters five shares (see *Prin.* 22, *ante*, p. 32). Their representatives would take the same, *Macn. Prec.* p. 126, *Cas.* lvi.

With regard to the sale by the widow, it may be observed, that she is a sharer by law, as well as a creditor, of the estate; and therefore, should the purchaser agree to the arrangement, the sale may be upheld as valid, so far as respects that part of the property which belongs to her in right of inheritance, *ib.*

This is an example of the third *Prin. of Dist.* (77, *ante*, p. 68).—The share in this case being an eighth and two-thirds, the original division must, agreeably to *Prin.* 66, *ante*, p. 59, be into twenty-four, of which, when the widow has taken her eighth, or three, there remain twenty-one to be distributed among the four daughters, which obviously cannot be done without a fraction; but on a comparison of the number of the heirs so situated, and the shares allowed to them, they appear to be *mootubayun*, or prime. Thus: $4 \times 5 = 21 - 1$; in which case the rule is, that the number of the original division be multiplied by the number of heirs who cannot get their portion without a fraction; thus: $24 \times 4 = 96$.

Of a Widow, with a Mother, Brother, and Three Sisters.—Where a man left a mother, brother, three sisters, a widow and a father-in-law, but, previous to his death, executed a document declaring his nephew to be his representative in proprietary right. The heirs of the deceased are his mother, brother, three sisters, and his widow; his father-in-law being excluded from the inheritance. His property will be distributed in the following manner:—after payment of the just debts, the residue will be made into sixty shares, of which fifteen (a fourth, see *Prin.* 14, *ante*, p. 33) will go to his widow, ten (a sixth, see *Prin.* 33, *ante*, p. 31) to his mother, fourteen to his brother, and the remaining twenty-one to his three sisters, or seven shares each (see *Prin.* 22, *ante*, p. 32). The share of the widow, after her death, will go to her father, or to her other lawful heirs, *Macn. Prec.* p. 125, *Cas.* lv.

According to Mahommedan law, the document in question is of no validity, and cannot confer any right of succession on the nephew, because it purports to constitute him the representative in proprietary right of the framer of it; in other words, it declares him in general terms to have the right to the entire property belonging to the framer of the document after the death of the latter. Such a declaration does not fall within any description of legal obligation, and has therefore no validity as to the creation of proprietary right, *Macn. Prec. ib.*

This is an example of the third *Prin. of Dist.* (77), *ante*, p. 68.—Where an eighth and a sixth occur together, the division (see *Prin.* 65, *ante*, p. 59) must originally be into twelve, of which, when the widow has taken her fourth share, or three, and the mother her sixth share, or two, there remain but seven to be divided among the other claimants, who must be counted as five. But five and seven are prime, therefore the number of the original division must be multiplied by the number of claimants who cannot get their portions without a fraction; thus: $12 \times 5 = 60$.

Of Two Daughters, with a Son's Son and a Son's Daughter.—Where a person leaves two daughters, a son's son, and a daughter of a son, after the necessary provision for funeral expenses, liquidation of debts, and payment of legacies to the extent of a third of the estate, the remainder will be made into nine shares, two-thirds of which, or three shares each, the daughters will receive (see *Prin. Inh.* 17, *ante*, p. 30), two shares of which the son's son will receive, and one share the son's daughter, in virtue of their right, as residuaries, *Macn. Prec.* p. 124, Cas. liii.

This illustrates the third *Principle of Distribution* (77, *ante*, p. 68). The legal shares in this case being two-thirds, the property should have been made originally into three shares; but of this number, after the daughters have taken their two-thirds, or two, there remains only one to be divided amongst the two other claimants, who must, however, be counted as three (a son receiving twice as much as a daughter); but (1) the remaining share and (3) the claimants being prime, the number of the original divisions must be

multiplied by the number of such claimants thus : $3 \times 3 = 9$, *ib. note*.

Of Three Sons, with Two Daughters and a Widow.—Where the proprietor of an estate had four sons, and two daughters, and one of the sons died during the father's lifetime, leaving a son—the proprietor left a widow, three sons, two daughters, and the said grandson—the estate must be divided into sixty-four shares, of which each son will take fourteen, each daughter seven (see *Prin. Inh.* 3, *ante*, p. 32), and the widow (an eighth) eight parts (*Prin. Inh.* 14, *ante*, p. 33). The grandson must be excluded from all participation, as his father died during the lifetime of the grandfather, *Macn. Prec.* p. 127, Cas. lvi.

This illustrates the third *Principle of Distribution*. The property must, in the first instance, be made into eight parts, to give the widow her share (an eighth); and after she has taken her share, there remain only seven to be divided amongst the other heirs, who must be counted as eight, though there are only five (one male getting the portions of two females): but these numbers 7 and 8 are prime to each other, consequently the number of the original division must be multiplied by the whole number of heirs who cannot get their portions without a fraction. Thus: $8 \times 8 = 64$, *ib. note*.

Of a Sister, with a Widow and Four Brothers' Sons.—Where a widow, four sons of the deceased's brother, an uterine sister, and a son of his uncle survive, and one of these persons got possession of all the property left by deceased, and retained the exclusive possession of it, for about twenty-five years. If the possession were acquired without right, according to law, it will not operate as a bar to the claims of inheritance. After providing for such expenses as are requisite before the partition of heritage, the remaining property will be made into sixteen parts, of which the sister will take eight shares, the widow four, and the remaining four will devolve on his brother's sons, each taking one: the son of the uncle is excluded, *Macn. Prec.* p. 129, Cas. lx.; *Third Prin. of Dist. ante*, p. 68.

Of a Widow with an only Daughter and Two Paternal Uncles.—Where a man left a widow, a daughter, and two

paternal uncles, descended from the same male ancestor as deceased, the widow will obtain an eighth, the daughter a moiety of the whole, and the remainder will be divided equally between the two paternal uncles, *Macn. Prec.* p. 128, *Cas.* lx. Thus the property will be divided into sixteen parts, of which the daughter will get eight, the widow two, and the paternal uncles three parts each, *Third Prin. of Dist.* (77, *ante*, p. 68).

Of a Widow with two Sons and two Daughters.—Where a person leaves two sons, two daughters, and a widow, after paying funeral expenses, debts, and legacies out of a third of the residue of the property, an eighth goes to the widow (*Prin.* 14, *ante*, p. 33) when there are children, and what remains should be divided between his two sons, and his two daughters, in the proportion of a double share to the males (*Prin.* 3, *ante*, p. 32), *Macn. Prec.* p. 128, *Cas.* lix. This is one example of the third *Prin. of Dist.* (77, *ante*, p. 68). The estate in this case should be made into forty-eight parts, of which the widow would be entitled to six, the sons to fourteen each, and the daughters to seven each, *ib. note*.

Of two Sons with a Mother and a Widow.—Where the deceased left his widow, his mother, and two sisters, the property must be divided into forty-eight parts, of which the widow takes six, the mother eight, and the sons seventeen each, *Macn. Prec.* p. 127, *Cas.* lvii.

There being sons, the widow's share is an eighth, and the mother's share a sixth; but it is a rule that where, amongst one set of sharers, one sharer is entitled to an eighth, and another to a sixth, or a third, or two-thirds, the division must be into twenty-four (*ante*, p. 59); but the eighth of twenty-four is three, and the sixth is four; consequently, after deducting seven for the widow's and mother's shares, there remain seventeen to be divided between the two sons, which cannot be done without a fraction; in which case the proportion between the shares, and the sharers is to be sought thus: $2 \times 8 = 17 - 1$. The two numbers being *mootubayun*, or prime, the root of the case, or the number of the original division must be multiplied by the number of sharers thus: $24 \times 2 = 48$, *Third Prin. of Dist.* (77); *Macn. ib. note*.

Of a Son with a Daughter and a Widow.—Where a man left his widow, one son, and one daughter, as his heirs, the estate must be made into twenty-four shares, of which the widow will be entitled to one-eighth, or three shares, the son to fourteen, to make his share double that of the daughter, who will be entitled to the remaining seven, *Macn. Prec.* p. 121, Cas. l.

This is an example of the third *Prin. of Dist.* (77, *ante*, p. 68.) The widow's share being one-eighth, the least number of shares must have been eight; but out of eight, when the widow has taken her share (one-eighth), there will remain but seven to be divided amongst the remaining sharers, who must be reckoned as three (one male always counting for two females); and seven cannot be divided, so as to give the son a share double that of a daughter, without leaving a fraction. The proportion, therefore, between the surplus shares, and the sharers must be sought for, which will be found to be *mootubayun*, or prime, thus; $3 \times 2 = 7 - 1$; and in this case the number of shares must be multiplied into the root of the case (that is, the original division), to give the requisite number of shares, thus: $3 \times 8 = 24$.

Of a Daughter with a Husband and Two Brothers.—Where a woman left a husband, an infant daughter, and two brothers, a fourth of her property will go to her husband, half (see *Prin.* 15, *ante*, p. 33) to her infant daughter, and the remainder to her brothers, *Prin.* 16, *ante*, p. 30; x. *Macn. Prec.* p. 121, Cas. lix.

In this case, an easy example of the third *Prin. of Dist.* (77, *ante*, p. 68) is exhibited. Where a half and a fourth occur together, the rule, agreeable to *Prin. Inh.* 57, *ante*, p. 57, is, that the original division must be by four; but after the husband has taken his fourth, or one, and after the daughter has taken her half, or two, there remains only one for the two brothers, which cannot be divided between them without a fraction; but one and two are prime, therefore the whole number of the original division should be multiplied by the whole number of heirs who cannot get their portions without a fraction, thus: $4 \times 2 = 8$.

Of Two Sons with a Widow.—Where a person left

two sons, and a widow, the property will be made into sixteen parts, of which the widow will take two, and the two sons seven parts each, *Macn. Prin.* p. 120, xlvi.

This is a very simple example of the third *Prin. of Dist.* (77, *ante*, 68). There being children, the widow's share is one-eighth (*Prin. Inh.* 14, *ante*, p. 34). Making the property therefore into eight parts, the least number from which her share can be extracted, and giving her one-eighth, there remain seven to be divided between the two sons, which obviously cannot be done without leaving a fraction; but the sharers (two) multiplied by three equal the shares (seven) minus one, what is termed *mootubayun*, the one number being prime to the other; in which case the rule is (see *Prin. of Dist.* (77, *ante*, p. 68), that the root of the case (that is to say, the number of the original division) be multiplied by the number of sharers who cannot get their shares without a fraction, thus: $8 \times 2 = 16$, *ib. note*.

Of a Son with a Widow and two Daughters.—Where a man leaves as his heirs, a widow, a son, and two daughters, his property will be divided into thirty-two shares, of which the widow will take an eighth, or four shares, the son will take fourteen, and the daughters seven each, *Macn. Prec.* p. 119, Cas. xlvii.

This is an example of the third *Prin. of Dis.* (77, *ante*, p. 68). Where the portions of one class cannot be divided without a fraction, and where there is no agreement between those portions, and the persons, or, as it is technically termed, where they are *mootubayun*—that is to say, where they have not one common measure, or terminate in an unit. Thus the widow's share being one-eighth (*Prin. Inh.* 14, *ante*, p. 34), the property must in the first instance be made at least into eight shares, and after the widow has taken her eighth, there will remain seven shares. Besides the widow there are four claimants (one son, counting for two daughters, his share being double). Now the agreement, or disagreement of these two quantities, four, and seven (the sharers and the shares), is to be ascertained, which is to be effected by diminishing the greater, by the smaller quantity on both sides, until they agree in one point, which is their common measure, or until

they terminate in an unit. When there is no numerical agreement, as in this case—thus : $4 = 7 - 3$ and $3 = 4 - 1$, the rule is then, that the number of persons (4) whose shares are broken is to be multiplied into the root (8) of the case ; thus : $4 \times 8 = 32$. I have not met with any case exhibiting an example of the second *Prin. of Distribution* ; but *Prin.* 76, *ante*, p. 68, exemplifies the rule, *Macn. Prec.* p. 120, *note*.

Of a Husband with Children.—Of a Father with a Brother.—Of two Sons with a Mother and Widow.—The wife received a deed of dower from her husband at the time of her marriage, but died before him, leaving two sons. The younger son subsequently died ; afterwards her husband, who had during his lifetime, remained in free and absolute possession of the property in dispute, died, leaving behind him the elder of the two sons, his mother, and his four slave-girls, one of whom was alleged to be married to him ; he also left a son by one of his slave-girls ; after his death his mother died. As the wife died, leaving two sons and a husband, her property—that is, the debt due to her for dower—must be divided into eight shares (*Third Prin. of Dis.* 77, *ante*, p. 68) ; her sons will take three shares each, and her husband two shares, or a fourth (*Prin.* 15, *ante*, p. 33) ; afterwards, on the death of her younger son, his three shares will go to her husband, who is his father (*Prin.* 21, *ante*, p. 32) ; so that five shares out of the eight shares, due on account of dower, revert to the husband, and the claim against him for so much, is extinct. The right to the remaining three shares belongs exclusively to the elder son. The husband dying, left as heirs his elder son, another son (by a slave-girl), his mother, and one female slave, who claims emancipation and marriage. In the event of the marriage being good, and valid, the estate left by the husband will be distributed into forty-eight shares, of which the sons will get seventeen each, the mother eight shares (a sixth), and the wife (that is, the married female slave) six shares (an eighth), *Macn. Prec.* p. 129, *Cas.* lxi.

Of Two Sons with a Mother.—In the event of the marriage not being good and valid, the estate left by the husband

will be distributed into twelve shares, of which the mother will get two shares (see *Prin.* 33, *ante*, p. 31), and the two sons five shares each; but as the amount of the debt, specified in the deed of dower, as due to the deceased wife, is immense, and exceeds 100,000 gold *mohurs*, even after a deduction of ten-sixteenths, the claim of dower absorbs the whole estate left by the husband, and the satisfaction of such claim is preferable to that of inheritance. But the mother of the husband was entitled to an eighth of the estate, in right of her husband, and had a claim on the ancestral property, on account of her dower, and was also in actual possession, and enjoyment thereof, after the death of her son. As she acknowledged the son of the slave to be her grandson, all her right and interest in the property, real and personal, should after her death be divided into two parts, and shared equally between the two sons, *Macn. Prec.* 131, *Cas.* lxi.

Of Two Sons with a Widow and a Daughter.—Where there is a widow, two sons, and a daughter, the property must be divided into forty shares. The widow will take one-eighth, or five shares, and the sons will take fourteen each, and the daughters seven, *Macn. Prec.* p. 122, *Cas.* li.

This is an example of the third *Prin. of Dis.* (77). The sharers, it must be remembered, are five, each son counting for two daughters (their shares being double). After the widow's eighth has been deducted, there will remain seven to be distributed among the five sharers, which cannot be done without a fraction. But five (the number of sharers) equal seven, the number of shares, minus two; and, again, two multiplied by two, equal five, minus one, which makes them *Mootubayun*, or prime; when the rule is, that the number of sharers is to be multiplied into the root of the case, thus: $5 \times 8 = 40$, *ib. note*.

4TH PRINCIPLE.

Where on comparison with the different sets of heirs, one or more sets cannot get their shares without a fraction—Mootumasil—Six daughters, three grandmothers, and three paternal uncles.

Fourth Principle.—The fourth principle is, when, on a comparison of the different sets of heirs, it appears that one,

or more sets, cannot get their portions without a fraction, and that all the sets are *mootumasil*, or equal, as in the case of six daughters, three grand-mothers, and three paternal uncles, in which case, according to Principle 61, *ante*, p. 58, the division must be by six. Here, in the first instance, a comparison must be made between the several sets, and their respective shares. The share of the daughters is two-thirds; but two-thirds of six is four, and four compared with the number of daughters, six, is *mootuwafiq*, or composite, agreeing in two. The share of the three grand-mothers is one-sixth; but one-sixth of six is one, and one compared with the number of grand-mothers is *mootubayun*, or prime. The remaining share, which is one, will devolve upon the three paternal uncles; but one compared with three is also *mootubayun*, or prime, *Macn. Prin.* 78.

Then the rule is, that the sets of heirs themselves, must be compared with each other, by the whole where it appears that they were *mootudakhil*, or concordant, or *mootubayun*, or prime; and by the measure, where it appears that they were *mootuwafiq*, or composite; and if agreeing in two, by half. In the instance of the daughters, the result of the former comparison was, that they agreed in two; consequently the half of their number must be compared with the whole number of the grandmothers, and of uncles, in whose cases the comparison showed a prime result. Thus $3 = 3$, and $3 = 3$, which being *mootumasil*, or equal, the rule is, that one of the numbers be multiplied into the number of the original division. Thus $3 \times 6 = 18$, of which the daughters will take (two-thirds) twelve, or two each; the grandmothers will take (a sixth) three, or one each; and the paternal uncles will take the remaining three, or one each, *Macn. Prin.* 78.

5TH PRINCIPLE.

Of five sons with six daughters and two widows—Acknowledgment of children by their parents—Of a father with two widows, five sons, and two daughters—Of six sons and six daughters and three widows.

Fifth Principle.—The fifth is when, on a comparison of the different sets of heirs, it appears that one, or more sets cannot get their portions without a fraction, and that the sets are *mootulakhil*, or concordant, as in the case of four wives,

three grandmothers, and twelve paternal uncles. In this case, according to Principle 65, *ante*, p. 58, the division must be by twelve, *Macn. Prin.* 79.

Here, in the first instance, a comparison must be made between the several sets, and their respective shares. Thus the share of the four wives is one-fourth—but the fourth of twelve is three, and three compared with the number of wives is *mootubayun*, or prime; the share of the three grand-mothers is one-sixth—but the sixth of twelve is two, and two compared with the number of grand-mothers, is also prime. The twelve remaining shares, which are seven, will devolve on the paternal uncles; but seven compared with twelve is also prime, *ib.*

Then the rule is, that the sets of heirs themselves must be compared, the whole of each, with the whole of each, as the preceding results show that they are prime, on a comparison of the several heirs with their respective shares. Thus : $4 \times 3 = 12$, and $3 \times 4 = 12$, which being concordant, the one number measuring the other exactly, the rule is, that the greater number must be multiplied into the number of the original division. Thus, $12 \times 12 = 144$, of which the wives will get (one-fourth) thirty-six, or nine each, the grand-mothers (a sixth) twenty-four, or eight each, and the paternal uncles the remaining eighty-four, or seven each, *Macn. Prin.* 79.

Of five Sons with six Daughters and two Widows.—Where one left two widows, the one married by the ceremony of Shadec, the other by that of Nikah; by the former he left three sons, and five daughters, by the latter two sons, and one daughter. The property will be made into 128 parts, of which the widows will take sixteen, or eight (*Prin.* 14, *ante*, p. 33), each, the sons seventy, or fourteen each, and the daughters forty-two, or seven each, *Macn. Prec.* p. 133, *Cas.* lxiv.

This is an example of the fifth *Prin. of Dis.* (79, *supra*). The share of the widow is one-eighth (*Prin.* 14, *ante*, p. 33), consequently eight is the least number of shares into which the estate should be divided; but after the widows have taken their eighth, or one, there remain seven to be distributed amongst the sixteen other claimants (one son counting as two daughters); but this cannot be done without a fraction, nor can one share be divided amongst the widows

without a fraction, and one and two are prime to each other, and so are seven and sixteen; and having ascertained this result, the whole number of one set of sharers must be compared with the whole number of the other. Thus: $2 \times 8 = 16$, which being concordant, the rule is, that the greater number must be multiplied into the number of the original division. Thus: $8 \times 16 = 128$.

Acknowledgment of Children by their Parents.—
Father, Widow, three Sons, and two Daughters.—A person left as his heirs, a father, a widow, three sons, and two daughters; but another woman, and her two sons claim part of the property, as the wife and offspring of the deceased; in proof of which, they rely upon an acknowledgment of the deceased during his lifetime, and the mode in which he took care of the claimants. If the deceased during his lifetime, acknowledged the parentage of those persons who now claim to be his sons, and after his death the mother made the same assertion, calling herself his widow, all those three persons will be his legal heirs, agreeably to the *Vigaya*. “Or, if a person die, having acknowledged a certain child to be his son; if afterwards the mother declare the child to have been his son, and herself to have been his wife, they both inherit.”—*Macn. Prec.* p. 132, Cas. lxiii.

Of a Father with two Widows, five Sons, and two Daughters.—According to this supposition, after defraying the funeral expenses and satisfying the debts and legacies, the estate of the deceased should be made into 288 parts; of which forty-eight should go to the father, eighteen to each of the two widows, thirty-four to each of the five sons, and seventeen to each of the two daughters, *Macn. Prec.* p. 133, Cas. lxiii.

This is an example of the *Fifth Prin. of Distribution* (79, *ante*, p. 79). Here, in the first place, the share of the widows (*Prin.* 14, *ante*, p. 33) is one-eighth, and of the father (*Prin.* 32, *ante*, p. 28) one-sixth; but where an eighth and a sixth occur together (*Prin.* 66, *ante*, p. 59), the division must be originally by twenty-four; of which, after the widows have taken their eighth, or three, and the father has taken his sixth, or four, there remain seven-

teen to be distributed among the twelve other claimants (the son counting as two daughters). But this cannot be done without a fraction, nor can three be divided between the two widows without a fraction, and two and three are prime to each other, and so are twelve and seventeen; and, having ascertained this result, the whole number of one set of sharers should be compared with the whole number of the other. Thus: $2 \times 6 = 12$, which being concordant, the rule is, that the greater number must be multiplied into the number of the original division. Thus: $24 \times 12 = 288$. *Ib.*

Of six Sons and six Daughters, and three Widows.—Where a man dies leaving three widows, six sons, and six daughters, his property will be made into 144 shares; of which the widows will get an eighth (see *Prin.* 14, *ante*, p. 33), or six shares each, the sons will get fourteen shares each, and the daughters seven shares each, or half (see *Prin.* 3, *ante*, p. 32), the amount of the son's share, *Macn. Prec.* p. 131, *Cas.* lxii.

This is an example of the fifth *Prin. of Distribution* (79, *ante*, p. 79), where there is a fractional division of an unit as to both sets of shares, and the number of one class of sharers equally measures the other. Thus, one-eighth being the share of the widows, the property cannot be made into less than eight shares, of which they, the widows, are to take one; but one cannot be distributed between the widows without leaving a fraction. Besides the widows, there are eighteen other claimants (supposing the son equal to two daughters, which is the mode of computation, the shares of the former, being double those of the latter). It is obvious, also, that the remaining seven shares cannot be distributed among eighteen persons without leaving a fraction. Between each set of shares, and each class of sharers there is a fractional division of an unit, termed *mootubayun*, or prime. Thus: the first set compared with the first class of sharers, is $1 \times 2 = 3 - 1$, and the second set compared with the second class of sharers is $7 \times 2 = 18 - 4$, and $4 = 7 - 3$, and $3 = 4 - 1$. But one class of sharers equally measures the other without a fraction, which is termed *mootudakhil*, or concordant, three being the measure of eighteen: $3 \times 6 = 18$.

The rule in this case is, that the greater number, 18, be multiplied into the root of the case. Thus: $18 \times 8 = 144$. I have not met with any case exhibiting the example of the fourth *Prin. of Distribution*, but *Prin. 78, ante*, p. 78, affords an exemplification of the rule, *Macn. Prec. 132, note*.

6TH PRINCIPLE.

Of eight sons with six daughters and four widows.

Sixth Principle.—The sixth is, when on a comparison of the different sets of heirs, it appears that one, or more sets cannot get their portions without a fraction, and that some of the sets are *mootuwafiq*, or composite with each other; as in the case of four wives, eighteen daughters, fifteen female ancestors, and six paternal uncles, in which case, according to *Prin. 66, ante*, p. 59, the original division must be by twenty-four. Here, in the first place, a comparison must be made between the several sets and their respective shares. Thus: the share of the four wives is an eighth; but an eighth of twenty-four is three, and three compared with the number of wives is *mootubayun*, or prime. The share of the eighteen daughters is two-thirds; but two-thirds of twenty-four is sixteen, and sixteen compared with the number of daughters, eighteen, is composite, and they agree in two. The share of the fifteen female ancestors is one-sixth; but a sixth of twenty-four is four, and four compared with the number of female ancestors, fifteen, is prime. The remaining share, which is one, will devolve on the six paternal uncles as residuaries; but one and six are prime, *Macn. Prin. 80*.

Then the rule is, that the sets of heirs themselves must be compared by the whole, where the preceding result shows that they were prime, and by their measure, where it shows that they were composite. Thus $4 \times 2 = 9 - 1$, which being prime, the one number must be multiplied by the other. This result must then be compared with the whole of the third set; because the preceding result shows that set to have been prime. Thus: $15 \times 2 = 36 - 6 = 15 - 9$, and $6 = 9 - 3$, which agreeing in three, the third of one number must be multiplied into the whole of the other. This result

must also be compared with the whole of the fourth set, because the preceding result shows that set to have been prime. Thus: $6 \times 30 = 180$, which being concordant, or agreeing in six, the sixth of one number must be multiplied into the whole of the other; but as it is obvious that by this process the result would still be the same, multiplication is needless. Then this result must be multiplied into the number of the original division. Thus: $180 \times 24 = 4320$; of which the four wives will get an eighth, 540, or 135 each; the eighteen daughters two-thirds, 2880, or 160 each; the female ancestors one-sixth, 720, or 48 each; and the paternal uncles the remaining 180, or 30 each, *Macn. Prin. ib.*

Of eight Sons with six Daughters and four Widows.—Where the heirs are four widows, eight sons, and six daughters, after satisfaction of the precedent claims, the residue of his property will be made into 352 shares, of which forty-four will go to his widows, or eleven shares to each, two hundred and eighty-four to his eight sons, or twenty-eight to each, and the remaining eighty-four to his daughters, or fourteen to each, *Macn. Prec. p. 134, Cas. lxx.*

This is an easy example of the sixth *Prin. of Dist.* (80, *ante*, p. 83). The share of the widows being one-eighth, the estate must, in the first instance, be made into at least eight shares, which number, therefore, is the root of the case. But the eighth of eight being one, it cannot be divided amongst the four widows without a fraction; and besides them there are twenty-two claimants (one male counting as two females). On a comparison of both sets of heirs with the number of their respective shares, they will be found to be prime, thus: $1 = 4 - 3$ and $3 = 4 - 1$, and $7 \times 3 = 22 - 1$; and then the proportion between the numbers of the respective sets of heirs being found to be composite, thus: $4 \times 5 = 22 - 2$, the rule is, that the measure of the first of the numbers (which is in this case two) be multiplied into the whole of the second, and the product into the root of the case, thus: $2 \times 22 = 44 \times 8 = 352$, *ib.*

7TH PRINCIPLE.

Of two sons with a daughter and two widows—Of a daughter with two widows, three brothers, and a sister—Rules for ascertaining the shares of different sets of heirs—Rules for ascertaining the shares of each individual of the different sets of heirs.

The Seventh Principle.—The seventh and last is when, on a comparison of the different sets of heirs, it appears that all the sets are *mootubayun*, or prime, and no one of them agrees with the other, as in the case of two wives, six female ancestors, ten daughters, and seven paternal uncles. Here, according to Principle 66, *ante*, p. 59, the original division must be by twenty-four, *Macn. Prin.* 81.

In the first instance, a comparison must be made between the several sets of heirs, and their respective shares. Thus, the share of the two wives is one-eighth; but the eighth of twenty-four is three, and three compared with the number of wives is prime. The share of the six female ancestors is one-sixth, but the sixth of twenty-four is four, and four compared with the number of female ancestors is composite, or agrees in two. The share of the ten daughters is two-thirds, and two-thirds of twenty-four is sixteen, and sixteen, as compared with the number of daughters is also composite, or agrees in two. The remaining share, which is one, will devolve on the seven paternal uncles; but one and seven are prime, *ib.*

Then the rule is, that the sets of heirs themselves must be compared by the whole, where the preceding result shows that they were prime, and by the half, or other measure, where it shows that they were composite. Agreeably to this rule, the whole of the first set of heirs must be compared with half of the second—thus: $2 = 3 - 1$, which numbers being prime, must be multiplied into each other; then the result must be compared with half of the next set, the former result here also having agreed in two. Thus: $5 = 6 - 1$, which being prime must be multiplied into each other. Then the result must be compared with the whole of the next set, the former result here having been prime—thus: $7 \times 4 = 30 - 2 \times 3 = 7 - 1$, which being also prime, must be multiplied into each other, thus: $30 \times 7 = 210$; in which case the

rule is, that this last product must be multiplied into the number of the original division, thus: $210 \times 24 = 5040$, of which the wives will take an eighth, 630, or 315 each; the female ancestors a sixth, 840, or 140 each; the daughters two-thirds, 3,360, or 336 each, and the paternal uncles the remaining 210, or 30 each.

Of two Sons with a Daughter and two Widows.—A person sues his father's widow, and his brother to recover possession of half the property, real and personal, left by his deceased father. His father left two sons, a daughter, and two widows. His estate must be divided into eighty shares, of which one-eighth (*Prin.* 14, *ante*, p. 33), or ten parts, will go to the widows, by the rule of inheritance—that is to say, five to each widow; and on the principle that the share of a male is double (*Prin.* 3, *ante*, p. 32) that of a female, fourteen shares will go to the daughter, and twenty-eight to each of the sons. But dower is like all other debts, and should be satisfied before claims of inheritance. Therefore, if the widow's claim is just, it should be satisfied before that of the heirs, and the residue should afterwards be distributed among them, *Macn. Prec.* p. 135, Cas. lxxvii.

This is an example of the seventh *Prin. of Dist.* (81, *ante*, p. 85). The share of the widows, according to *Prin.* 14, *ante*, p. 33, being one-eighth, the estate should originally have been made into eight parts; and after they have taken one as their eighth, there remain seven to be distributed among the five other claimants (one son counting as two daughters), which cannot be done without a fraction, neither can one share be divided between the two widows without a fraction: but one is prime to two, and so is five to seven, and having ascertained this prime result, the whole of one set of sharers should be compared with the whole of the other, thus: $2 \times 2 = 5 - 1$; which giving a prime result, the rule is, that the first of the numbers is multiplied into the second, and the product into the number of the original division, thus: $2 \times 5 = 10 \times 8 = 80$, *Macn. Prec.* 136, *note*.

Of a Daughter with two Widows, three Brothers, and a Sister.—When a man left as his heirs two widows, a mother, a daughter, three brothers, and a sister, the estate

will be distributed into 336 shares, of which the widows will take their legal share of one-eighth (*Prin.* 14, *ante*, p. 33), being forty-two shares, or twenty-one each; the mother will take her legal share, one-sixth (*Prin.* 33, *ante*, p. 31), being fifty-six shares; the daughter will take her legal share of one-half (*Prin.* 16, *ante*, p. 30), being 168; and the remaining seventy shares will be distributed among the brothers and sisters as residuaries, according to the known rule of a double share for the male, being twenty shares for each of the brothers, and ten for the sister, *Macn. Prec.* p. 134, *Cas.* lxvi.

This case affords an example of the seventh *Prin. of Dist.* 81, *ante*, p. 85. The share of the wives being one-eighth, and that of the mother one-sixth, the rule is (see *Prin.* 66, *ante*, p. 59) that the estate must, in the first instance, be made into twenty-four parts, which number, therefore, is the root of the case. But after deducting twelve from the daughter's half, four for the mother's sixth, and three for the widow's eighth, there remain five only to be distributed among the seven residuary heirs (one brother counting as two sisters), which distribution cannot take place without a fraction. Neither can three be divided between the two widows without a fraction; consequently there is a fractional division in two sets of heirs, and the shares, and the sharers are in both instances prime to each other, thus: $2 = 3 - 1$, and $5 = 7 - 2$, and $2 \times 2 = 5 - 1$, in which case the rule is to ascertain the proportion between the numbers of the respective sharers, ($2 \times 3 = 7 - 1$), which is found to be prime, or divisible by an unit only, and, this being ascertained, the first of the numbers must be multiplied into the second, and the product into the root of the case. Thus: $2 \times 7 = 14 \times 24 = 336$.

Rule for ascertaining the Shares of Different Sets of Heirs.—When the whole number of shares into which an estate should be made has been found, the mode of ascertaining the number of portions to which each set* of heirs is entitled, is to multiply the portions originally assigned them by the same number, by which the aggregate of the

* Under the term "set" are comprised all persons who divide their allotted shares equally amongst them.

original portions was multiplied; as an easy example of which rule the following case may be mentioned:—There are a widow, eight daughters, and four paternal uncles, the shares of the first two sets, being one-eighth and two-thirds; the estate, according to Principle 66, *ante*, p. 59, must be made originally into twenty-four parts, of which the widow is entitled to three, the daughters to sixteen, and there remain five to be divided amongst the four paternal uncles, but which cannot be done without a fraction. Here the proportion between the shares, and the heirs who cannot get their portions without a fraction, must be ascertained, and $4 = 5 - 1$ being prime, the rule is (see No. 77, *ante*, p. 68) to multiply the number of 61 the original division by the whole number of the heirs so situated. Thus: $24 \times 4 = 96$. Here, to find the shares of each set, multiply what each was originally declared entitled to, by the number by which the aggregate of all the original portions was multiplied. Thus, $3 \times 4 = 12$, the share of the widow; $16 \times 4 = 64$, the share of the daughters; and $5 \times 4 = 20$, the share of the paternal uncles, *Macn. Prin.* 82.

Rule for ascertaining the Shares of each Individual of the Different Sets of Heirs.—To find the portion of each individual in the several sets of heirs, ascertain how many times the number of persons in each set may be multiplied into the number of shares ultimately assigned to each set. Thus, $8 \times 8 = 64$ and $5 \times 4 = 20$. Here eight will be the share of each daughter, and four the share of each paternal uncle, which, with the twelve that formed the share of the widow, will make up the required number, ninety-six, *Macn. Prec.* 83.

Elberling, p. 60, says: “Whenever there are different sets of heirs, and several individuals in each set entitled to partition, the following rule of distribution should be observed. Write in a line the fractions representing the shares to which the given heirs, or sets of heirs are entitled. Divide these fractions by the number of individuals in each set, to obtain the share of each claimant separately. The least* common multiple of the denominators of these fractions

* To find the least “common multiple” of any number—*i.e.* the least number which will contain them all—write down in one line the

will show the number of parts into which the whole estate ought to be divided."

Example I. Thus, let the heirs be a father, a wife, and ten daughters; their shares are respectively 5-24ths, one-eighth, and two-thirds. Here the last set is the only one which contains a number of individuals, and therefore dividing $\frac{2}{3} \times 10$, we have 5-24ths, one-eighth, and one-fifteenth, representing the shares to which each individual of each set is entitled.

Find the least common multiple of the denominator of these fractions, thus—

$$\begin{array}{r} 3 \) \ 24, \ 8, \ 15 \\ 8 \) \ \underline{8, \ 8, \ 5} \\ \quad \underline{1, \ 1, \ 5} \end{array}$$

The least common multiple is, therefore, $3 \times 8 \times 5 = 120$. The estate should be divided into 120 shares, to be distributed as follows:—

For the Father	.	.	25/120, or 25 shares.
For the Wife	.	.	15/120, or 15 shares.
For the Ten Daughters			80/120, or 80 shares.
Total			<u>120</u>

Example II. Let the heirs be two wives, six true grandmothers, ten daughters, and seven paternal uncles. Here these shares are respectively—

Wives.	Grandmothers.	Daughters.	Uncles.
$\frac{1}{8}$	$\frac{1}{6}$	$\frac{2}{3}$	$\frac{1}{24}$.

numbers of which the least common multiple is required, separating them by a comma. Divide those which have a common measure, or divisor, by that common measure, and bring down the other numbers, placed in a line with the quotients, separated as before, and repeat this process as long as any common measure exists for two or more of them. The least common multiple required will be the continued product of the divisors, and of the final quotients.

Example—Required the least common multiple of 8, 12, 18, 20 and 75.

$$\begin{array}{r} 2 \) \ 8, \ 12, \ 18, \ 20, \ 75 \\ 3 \) \ \underline{4, \ 6, \ 9, \ 10, \ 75} \\ 2 \) \ \underline{4, \ 2, \ 3, \ 10, \ 25} \\ 5 \) \ \underline{2, \ 1, \ 3, \ 5, \ 25} \\ \quad \underline{2, \ 1, \ 3, \ 1, \ 5} \end{array}$$

The least common multiple is $2 \times 3 \times 2 \times 5 \times 2 \times 1 \times 3 \times 1 \times 5 = 1,800$.

Dividing these fractions by the number of individuals in each set, we get—

Wife.	Grandmother.	Daughter.	Uncle.
$\frac{1}{16}$	$\frac{9}{36}$	$\frac{1}{15}$	$\frac{1}{168}$.

Find the least common multiple of the denominator of these fractions, thus—

$$\begin{array}{r} 4 \) \ 16, \ 36, \ 15, \ 168 \\ \hline 3 \) \ 4, \ 9, \ 15, \ 42 \\ \hline 2 \) \ 4, \ 3, \ 5, \ 14 \\ \hline 2, \ 3, \ 5, \ 7 \end{array}$$

The least common multiple is $4 \times 3 \times 2 \times 2 \times 3 \times 5 \times 7$, or 5,040, into which the property should be divided, the share of each member of each set being—

Wife.	Grandmother.	Daughter.	Uncle.
315	140	336	30..
The two Wives get			
The six Grandmothers			
The ten Daughters			
The seven Uncles			
Total			<u>5,040</u>

See *Siraj.*, p. 19.

CHAPTER VII.

SECTION I.—OF THE EXTRACTORS OF SHARES.

SECTION II.—OF THE INCREASE.

SECTION I. •

Method of extracting shares—When only one share is to be extracted the share is called the extractor—If two or more shares, all of one series, the name of the lowest share is the extractor—Shares of different series—A half with any of the second series—When a fourth, the extractor is twelve—When an eighth it is twenty-four—The estate to be divided into as many parts as there are units in the extractor.

Method of Extracting Shares—Shares divisible into two Series.—We have seen (*ante*, p. 28) that shares may all be divided into two series, each consisting of three terms, of which the intermediate one, is half that which precedes, and double that which follows it. The first series comprises a half, a fourth, and an eighth share; the second series comprises two-thirds, one-third, and a sixth, *Bail. Inh.* p. 87.

When only One Share is to be Extracted, the Share is called the Extractor.—If there is only one share, whatever it may be, in order to extract it from the general *corpus* of the estate nothing more is required, than to divide the *corpus* by the fraction which represents the share, and the quotient will be the amount required. The share itself is called the extractor. Thus two is the extractor for one-half, three for one-third, four for one-fourth, and so on, *ib.*

But if there are Two or more Shares, all of one Series, the Name of the Lowest Share is the Extractor.—If there are two, or more shares of the same series, as a sixth and a third, a half, a fourth, and an eighth, the name of any of the shares might serve the purpose of an extractor; but in taking the greater share for the purpose, there would be this inconvenience, that the smaller must be expressed by a fraction; to avoid which the rule is, that the name of the lowest share shall be taken for the extractor. Therefore, where the shares are a third and a sixth, the extractor is a sixth, and when they

are a half, a fourth, and an eighth, the extractor is eight, and the estate is divisible into six or eight portions accordingly.

Shares of Different Series.—We have hitherto been treating of shares of the same series, but it may happen that there are shares to be extracted which belong to a different series. In that case the extractor must be sufficiently large to admit of being divided by all the shares without a fraction, and it is the smallest number which is so divisible. Thus,—

A Half, with any of the Second Series.—If there is a half with one, or more of the second series, the extractor is six, which is the least number divisible by a half, a sixth, a third, and two-thirds, without a fraction.

When a Fourth the Extractor is Twelve.—When there is a fourth, with one, or more of the second series, the smallest number divisible without a fraction by a fourth, a sixth, a third, and two-thirds, is twelve, which is the extractor.

When an Eighth it is Twenty-four.—So where an eighth is found in conjunction with a sixth, a third, or two-thirds, the extractor is twenty-four, which is the lowest number that can be divided by all these numbers without a fraction, *Siraj.*; *Bail. on Inh.* 88.

The Estate to be divided into as many Parts as there are Units in the Extractor.—The estate in all the cases mentioned must be divided into as many parcels, as there are units in the extractor, and a corresponding number of these parcels set apart for such share. Thus, if a woman die, leaving a husband, and two half-sisters by the mother, the share of the husband is one-half, and of the two sisters a third, which presents the concurrence of a half with one of the second series, so the estate is divisible into ten parcels, whereof three go to the husband, and two to the sisters, the remainder being the property of the residuary; so, in the case of a husband with two daughters, the share of the former being a fourth, and of the latter being two-thirds, the estate must be divided into twelve parts, three go to the husband, eight to the daughters, and the surplus is residue; so, in the case of a wife, two daughters, and a mother, the wife gets one-eighth, the two daughters two-thirds, and the mother one-sixth. The estate must be divided into twenty-four

parcels, three will go to the wife, sixteen to the daughters, four to the mother, and the one remaining to the residuaries, *Bail. Inh.* 89.

SECTION II.

OF THE INCREASE.

Mode of reducing shares when they exceed the amount of the estate—Definition of—By Macnaghten—By Elberling—By Baillie—Where the shares are equal—Less—More—Cases in which the increase occurs—Extractors which never increase—1, of the increase of six—When it is increased to seven—Of a husband, a daughter, and both parents; When to eight; When to nine; When to ten—2, of the increase to twelve—When to thirteen—Of a daughter with a mother, a father, and a husband—When to fifteen—When to seventeen—3, of the increase of twenty-four—When it is increased to twenty-seven.

Mode of reducing Shares when they Exceed the Amount of the Estate.—The doctrine of the increase is, no doubt, easy enough of apprehension to the Oriental mind; but the European does not consider it so very intelligible. The student, whose mind is unaccustomed to the devices adopted by Mahomedan lawyers to work out their system of distribution of the property of deceased persons, amongst the heirs, finds it very puzzling. It is believed that the most simple mode of treating so complicated a subject is, to repeat here the language in which each writer on the subject has expressed the doctrine, leaving the student to adopt whichever he may consider the clearest.

Where the estate is sufficient to meet the claims of all persons entitled to share in it, the rules with regard to legal sharers, and residuaries suffice for extracting the shares. But there are cases in which the estate is not sufficient for that purpose. Where that is so, a method has been devised for reducing the shares rateably to meet the deficit, which consists in raising the extractor of the case, or, in other words, the common denominator of the fractions in which the shares are expressed, while their enumerators remain

unchanged. Thus, if the deceased has left a husband and two full sisters, the share of the former being in such circumstances a half, and of the latter two-thirds, or, when reduced to fractions of the same denomination, three-sixths and four-sixths, there is obviously one-sixth more than the amount of the estate, and it is distributed over the shares by advancing the common denominator from six to seven, the number indicated by the addition of all the numerators. The husband's share becomes three-sevenths in consequence, and the share of the sisters four-sevenths. That the original ratio between the shares is preserved is obvious from the proportion : $\frac{3}{6} \times \frac{4}{7} = \frac{4}{6} \times \frac{3}{7}$.

This is called the doctrine of the increase, because the extractor is increased in the manner described, *Siraj*. 25 ; *Bail. on Inh.* 90.

Definition of the Increase.—Macnaghten defines the increase thus: “Where there are a certain number of legal sharers, each of whom is entitled to a specific portion, and it is found on a distribution of the shares into which it is necessary to make the estate, that there is not a sufficient number to satisfy the just demands of all the claimants.”—*Macn. Prin.* 88.

This is the natural consequence of a system which requires the division of unity, into a number of fractional parts ; the fractions, when added together, being sometimes found to be greater, sometimes less, than the whole. The doctrine of the increase provides for the former class of cases. The doctrine of the return for the latter, although, in this latter case, a difficulty arises only when there are no residuaries.

The increase, then, is the division of the estate into a larger number of parts than that indicated by the least common denominator of the fractional shares.

Elberling says: “Whenever the sum of the shares to which persons are entitled exceeds the whole estate, each of the sharers must suffer a proportionate reduction, or, in other words, the number of the shares must be increased.”—*Elb.* 58.

The shares of the sharers may be equal, or less, or more than the shares of the property, *i.e.* the sum of the

fractions that represent the shares are equal to, or less, or more than an integer, or whole number, *Bail. Dig. M. L.* 713.

Equal.—In the first case they are said to be *ādil*, or just; as when the deceased has left two full sisters and two half-sisters by the mother, and the former take two-thirds, and the latter one-third; or when the shares of the sharers are less than the shares of the property, but there is a residuary to take what remains, *ib.*

Less.—In the second case the shares are said to be *kasir*, or deficient, as when they are less than the shares of the property, and there is no residuary; for instance, where the deceased has left two full sisters, and a mother, and the sisters take two-thirds, and the mother one-sixth, and they also take what remains, because there is no residuary. This is a case of return, *ib.*

More.—In the third case, which is termed *āil*, or excessive, the shares of the sharers exceed the shares of the property—by their being, for instance, two-thirds and a half, as in the case of a husband with two full sisters and a mother, or two halves and a third, as in the case of a husband with one full sister and a mother. To this case the rule of the *awl*, or increase, is applicable, according to the majority of the companions, and it consists in raising the shares of the property to the number of the shares of the sharers, by which means the deficiency is distributed over all the sharers in proportion to their shares. Thus, in the two cases above mentioned, where the shares amount to seven-sixths and eight-sixths respectively, the extractor of the case, or six, is raised to seven and eight respectively, so that the sharers, instead of getting so many sixths of the property, get only so many sevenths in one case, and so many eighths in the other, *ib.*

Cases in which the Increase occurs.—The increase is said to occur only in three cases, viz. where the estate has to be divided into six, or twelve, or twenty-four shares respectively. (See *Macn. Prins.* 67, 68, 69, *ante*, p. 59, *Prin.* 89.)

The other four extractors, viz. two, three, four, and eight, never increase, because in all the cases in which

they are required the estate is either exactly commensurate with the claims upon it, or there is a surplus after the shares have been satisfied, *Bail. Inh.* p. 91.

Thus the only case where the extractor *two* can be required is, either where the estate is to be divided into two equal parts, as between a husband and a full sister, or, into a half and residue, as between a husband and a full brother.

Again, the only cases that require the extractor *three* are those where the estate is to be divided into a third, and residue, as when the deceased has left a mother, and a full brother; two-thirds and residue when there are two daughters, and a full brother; or one-third and two-thirds, as with two half-sisters by the mother and two full sisters, *ib.*

The only cases that require the extractor *four* are those where the estate is to be divided into a fourth and residue, as, in the case of a husband and a son; a fourth, a half, and residue, where the heirs are a husband, a daughter, and a full brother; or a fourth, a third, and residue, as in the case of a widow with both parents, *ib.*

The only cases that require the extractor *eight* are those where the estate is to be divided into an eighth and residue, as where there is a widow and a son; or an eighth, a half, and residue, as in the case of a wife, a daughter, and a full brother, *Shurreefa*; *ib.*

1. Of the Increase of Six.—In the first instance, where six is the number of shares into which it is proper to distribute the estate, but that number does not suit to satisfy all the shares without a fraction (*i.e.* where the least common denominator is six), the number of parts may be increased to seven, eight, nine, or ten, *Macn. Prin.* 67. Thus—

It is increased to Seven where the estate is to be divided into a half, Three-sixths, and One-sixth as in the case of a husband and two full sisters; and also in the case of a husband, a full sister, and a half-sister, the share of the first two being each a moiety, or three-sixths, and that of the last being one-sixth, *Bail. Inh.* 92.

Where there are a grandmother, one full sister, two half-sisters by the mother, and one half-sister by the father, and the division is into six shares, whereof the grand-mother has

a sixth (one), the full sister one-half (three), the half-sister by the mother a third (two), and the half-sister by the father a sixth (one), or seven in all—to which number, accordingly, the extractor must be raised, *Bail. Dig. M. L. 714*.

It is increased to Eight where the estate is to be divided into a half, two-thirds, and a sixth, as where the deceased has left a husband, two full sisters, and a mother, the original extractor is six; or where the estate is to be divided into two moieties, and a third, as where there are a husband, a full sister, and two half-sisters by the mother, *Bail. Inh. 92*.

It is increased to Nine where the estate is to be divided into a half, two-thirds, and a third. Thus, where there is a husband, two full sisters, and two half-sisters by the mother; or into two moieties, a third, and a sixth, as in the case of a husband, a full sister, two half-sisters by the mother, and a mother, *ib.*

Where there are a husband, a mother, and three sisters of different kinds, the original extractor, which was six, must be raised to nine, of which the husband takes three, the mother one, the half-sister by the mother one, the full sister three, the half-sister by the father one, to make up the complement of two-thirds—all ninths instead of sixths, as they would have been, but for the necessity of the increase, *Bail. Dig. M. L. 714*.

It is increased to Ten when the estate is to be divided into a half, or three-sixths, two-thirds, or four-sixths, one-third, or two-sixths, and one-sixth, making together ten sixths; thus, where the deceased has left a husband, who takes one-half, or three-sixths, two full sisters, who take two-thirds, or four-sixths, two half-sisters by the mother, who take one-third, or two-sixths, and a mother, who takes one-sixth, *Bail. Inh. 92*.

2. Of the Increase to Twelve.—In the second instance, where *twelve* is the number of shares into which it is proper to distribute the estate, but that number does not suit to satisfy all the shares without a fraction—*i.e.* where the least common denominator is twelve—the number of parts may be increased to thirteen, fifteen, or seventeen, *Macn. Prin. 68*
Thus—

It is increased to Thirteen where the estate is to be divided into a fourth, two-thirds, and a sixth, as in the case of a widow, two full sisters, and a half-sister by the mother; the share of the first being a fourth, of the second being two-thirds, and the third being a sixth, *Bail. Inh.* 92.

Where a man dies, leaving a widow, a mother, and a sister, the property should be made into thirteen parts, of which, after the widow gets three and the mother four, there remain only five shares instead of six for the sister, the number twelve should be increased to thirteen, of which the widow gets three, the mother four, and the sister six, *Macn. Prec.* p. 140, *Cas.* lxix.

This case affords an example of the doctrine of the increase (see *Prin.* 68, *ante*, p. 97, and 90, *infra*). In the first place the property should be made into twelve parts, according to *Macn. Prin.* 65, *ante*, p. 58, the shares of the claimants being a fourth, a third, and a half. But when the widow has taken her fourth, or three, and when the mother has taken her third, or four, there will not remain half for the sister, and the number twelve must therefore be raised to thirteen to enable all the heirs to obtain their respective portions, *ib. note*.

A Woman leaves a Husband, a Daughter, and both Parents.—Here the property should be made into twelve parts, of which, after the husband has taken his fourth, or three, and the parents have taken their two-sixths, or four, there remain only five shares for the daughter instead of six, or the share to which by law she is entitled. In this case the number twelve, into which it was necessary to make the estate, must be increased to thirteen, with a view of enabling the daughter to realize six shares of the property, *Macn. Prin.* 90.

Of a Daughter with a Mother, a Father, and a Husband.—Where a woman leaves as her heirs a daughter, a mother, a father, and a husband, the estate, whether consisting of dower, or any other property, should be made into thirteen parts, of which her mother is entitled to two, her father to two, her husband to three, and her daughter to six shares, *Macn. Prec.* p. 141, *Cas.* lxx.

It is increased to Fifteen when the estate is to be divided into a fourth, two-thirds, and one-third, as in the case of a wife, two full sisters, and two half-sisters by the mother, the first being entitled to a fourth, the second to two-thirds, and the third to one-third; or where the estate is to be divided into a fourth, two-thirds, and two-sixths, as in the case of a widow, who takes a fourth, two full sisters, who take two-thirds, two half-sisters by the mother, and a mother, who take two-sixths.

It is increased to Seventeen when the estate is to be divided into a fourth, two-thirds, one-third, and a sixth, as in the case of a wife, who takes a fourth, two full sisters, who take two-thirds, two half-sisters by the mother, who take one-third, and a mother, who takes a sixth.

3. Of the Increase of Twenty-four.—In the third instance, where twenty-four is the number of shares into which it is proper to distribute the estate, but that number does not suit to satisfy all the shares without a fraction—*i.e.* where the least common denominator is twenty-four—the number of parts may be increased to twenty-seven, *Macn. Prin.* 69, *ante*, p. 59, so that the extractor, twenty-four, admits of only one increase, as in the case of a widow who takes an eighth, or three twenty-fourths, two daughters, who take two-thirds, or sixteen twenty-fourths, and both parents, each of whom takes one-sixth, or four twenty-fourths, making in all twenty-seven shares, *Bail. Inh.* 93.

CHAPTER VIII.

THE RETURN.

Definition—Disposal of surplus on failure of residuaries—Widower and widow—Number of persons entitled to a return—Circumstances under which it takes place—Return is the converse of the increase—The second division—Of a sister being the only heir—In the case of two daughters and their mother, who was the slave of the deceased proprietor—Of consanguine or half-sisters by the same father with uterine sister—The third division—Of a daughter with a husband—Of a widow with a daughter—Of a widow with a mother—Of brothers' daughters with a widow and a mother—Of a widow with two daughters—Fourth division—When the remaining parcels or sharers quadrate, or are commensurable—When the remaining parcels and sharers do not quadrate, or are incommensurable.

Definition—Disposal of Surplus on Failure of Residuaries.—We have already stated that any surplus left after distributing the estate amongst the sharers, goes to the residuaries. If there be no sharers, the whole property devolves upon the residuaries; if, on the contrary, there be no residuaries, the surplus, or residue of the shares of the sharers, reverts to the sharers connected with the deceased by consanguinity. This is technically called the return, *Elb.* 68; *Macn. Prin.* 91, and is therefore the converse of the increase, *Siraj.* 21.

The return is therefore the apportionment of the surplus amongst the sharers when the shares do not exhaust the estate, and there are no residuaries. The author of the *Sirajiyah*, p. 20, says: “The return is the converse of the increase, and it takes place in what remains above the shares of those entitled to them, when there is no legal claimant of it. This surplus is returned to the sharers according to their rights except the husband and wife.”

Widower and Widow.—The widower and widow, therefore, get no share of the return, so long as there are heirs by blood alive. On failure of such heirs, however, the widower, or widow takes the whole estate, *Elb.* 58; *Com. on Siraj.* 90.

Where there was no heir of the deceased, except a widow, and the property, after payment of a legacy, and the widow's share, properly belonged to the public treasury, it was held, that, as that was an extinct institution, the residue reverted to the widow, *Muss. Subhane v. Bhetun*, 1 S. D. A. 346.

The excluding heir by blood may be also a distant kindred, *Sudagopah Charloo, Mah. Civ. Law*, p. 31.

Number of Persons entitled to a Return.—All the persons to whom there may be a return are seven in number, viz., (1) the mother, (2) the grandmother, (3) the daughter, (4) the son's daughter, (5) the full sister, (6) the half-sister by the father, (7) the half-brother, or sister by the mother.

The exclusion of the husband, and wife has given rise to a fourfold division of the cases in which the return takes place; thus, there may be only one class, or there may be two, or three classes of persons who are entitled to participate in it, and in each of these cases there may, or may not be a person who has no right to participate—in other words, a husband, or wife, *Siraj*. p. 23; *Bail. on Inh.* 114; *ante*, p. 100.

Elberling, 58, says: “If there be only one set, or class* of sharers, the return shall be divided equally amongst them. If there be different classes† of sharers, each class will get a share of the return, in proportion to the extent of the return.”

Circumstances under which it takes place.—We have said (*supra*) the numbers to which extractors‡ may be reduced by means of the return are four—*i.e.* two, three, four, and five—that is, the return takes place in four cases.

In the *Sirajiyyah*, p. 22, it is said: “The first of them is, when there is in the case but one sort of kinsmen,§ or class of sharers to whom a return must be made, and none of those who are not entitled to a return, *i.e.* husband, or wife; then settle the case according to the number of persons”—in

* *i.e.* Where they are in the same grade.

† *i.e.* Where they are not in the same grade.

‡ *i.e.* A number by which it may be eliminated without a fraction from the amount of the property.

§ *i.e.* Of the same grade.

other words, divide the property into as many parcels as there are individuals in the class, and give to each a parcel. For example: "When the deceased has left two daughters, or two sisters, or two female ancestors (grand-mothers), settle it by two;" that is, the estate is to be divided into two parcels, or shares, and each is entitled to one, on the ground of the equality of their rights in the share, and in the return.

The Return is the Converse of the Increase.—We have seen that the operation employed in ascertaining the increase is to raise the extractor of the case, or the common denominator of the fractions in which the shares are expressed, while their numerators remain unchanged (see *ante*, p. 93); so, as the return is the converse of the increase (see *ante*, p. 100) the operation must be reversed; and that is done by reducing the extractor of the case, or common denominator of the shares, leaving the numerators unchanged. And in both cases the new extractor, whether increased, or reduced, is the aggregate of all the shares. Thus, where the deceased has left a husband, and two full sisters, the extractor of the case being six, is raised to seven, the sum of the three shares of the former, and four of the latter, which become three, and four-sevenths respectively; and in the case of a mother and daughter being the sole heirs, the extractor, which is also six, is reduced to five, the aggregate of the one-sixth of the former, and four-sixths of the latter, which become in like manner one-fifth, and four-fifths respectively, *Bail. on Inh.* 115.

First Division.—Macnaghten, *Prin.* 92, says: "Where there is only one class of sharers unassociated with those not entitled to claim the return, as in the instance of two daughters, or two sisters, the surplus must be made into as many shares as there are sharers, and distributed amongst them equally."

Mr. Baillie, *Dig. M. L.* 715, says: "When all the sharers are persons to whom a return may be made, the surplus drops, and the extractor is reduced to the aggregate of the shares. Example of a reduction to two, a grandmother and a half-sister by the mother. Here each of the parties is entitled to one-sixth, and the remainder reverts to them in

proportion to their shares. The original division of the case, which was into six parts, is thus reduced to two, and each party takes a half."

Of a Sister being the only Heir.—If the husband die leaving only one sister, and no other sharers, or residuaries, the sister will take the whole property left by her brother (whether he derived it from his wife or otherwise), half in virtue of her legal share, and half for the return, *Macn. Prec.* p. 142, Cas. lxxii.

This case exemplifies the doctrine of the return (see *Prin.* 92), or first division, *ante*, p. 102. The legal share of the daughters is only two-thirds of the property, but there being no other heirs, they take the surplus third, which reverts to them, *ib. note*.

In the case of two Daughters and their Mother, who was the Slave of the deceased Proprietor.—Where a person dies, leaving two daughters by a female slave, who also survives him, the female slave has no right to any share in the estate, the funeral expenses and debts must first be discharged, and the surplus, according to divine law, be made into three parts; of which two will go to the daughters, or one share to each, and the remaining one to the residuary heir, if there be any. On failure of such residuary, the whole property, in virtue of their legal shares, and of the return, will be vested in the daughters, as is laid down in the law tracts treating of such succession. In the *Sirajiyyah*, "Impediments to succession are four: 1st, servitude, whether it be perfect or imperfect." The expression "perfect" indicates absolute slavery, and "imperfect" indicates *moodubbirs* and *mookatibs*, and those who are mothers of offspring. Daughters begotten by the deceased, take in three cases, half goes to one only, and two-thirds to two or more, *Macn. Prec.* p. 141, Cas. lxxi.

This case exemplifies the doctrine of the return (see *Prin.* 92, *ante*, p. 102). The legal share of the daughters is only two-thirds of the property, but, there being no other heirs, they take the surplus third, which reverts to them, *ib. note*.

The Second Division.—In the *Sirajiyyah* it is said, the

second is when there are joined in the case two, or three sorts of those to whom a return must be made without any of those to whom there is no return;* then settle the case according to their shares—I mean, by two, if there be two-sixths in the case; or by three, where there are a third and a sixth in it; or by four, where there are a moiety and a sixth in it; or by five, where there are in it two-thirds and a sixth, or half and two-sixths, or half and a third.

Macn. Prin. 93, says: “Where there are two or more classes of sharers unassociated with those not entitled to claim the return,† as in the instance of a mother, and two daughters; in which case the surplus must be made into as many shares as may correspond with the shares of inheritance to which the parties are entitled, and distributed accordingly. Thus, the mother’s share being one-sixth, and the two daughters’ share two-thirds, the surplus must be made into six; of which the mother will take two, and the daughters four.”‡

Mr. Baillic, in his work on *Inheritance*, p. 115, says: “When there are two, or three classes of sharers, and neither husband, nor wife, arrange the case according to the number of shares—*i.e.* divide the estate into as many parcels as may correspond with the number of shares to which the parties are entitled. Thus, where the sole heirs of the deceased are a grand-mother, and a half-sister by the mother, whose shares are each a sixth, divide the estate into two parcels, the aggregate of their shares, and give one parcel to each. In like manner, when the heirs are two half-brothers, or sisters by the mother, and a mother, the shares being two-sixths, and one-sixth, the estate is to be divided into three parcels, whereof one belongs to the mother, and two to the half-brothers, or sisters. So, where the deceased has left a daughter, and a son’s daughters, or a daughter, and mother, the division is into four parcels, whereof three belong to the daughter, and one to the son’s daughter, or to the

* Husband or wife.

† See Rumsay, p. 26, note.

‡ Mr. Rumsay questions the correctness of the division of the surplus in this case, *Chart of Moohummedan Inh.* p. 26, note.

mother. And in the case of a daughter, son's daughter, and a mother, whose shares are respectively three-sixths, one-sixth, and one-sixth, the estate is to be divided into five parcels, whereof three are the property of the first, and one of each of the others."

In the case of Consanguine or Half-Sisters by the same Father, with a Uterine Sister.—On the death of A. his widow became possessed of his land in proprietary right; she died, leaving a uterine sister, and a sister by the same father only (consanguine): the property will devolve on her uterine, and consanguine sisters, the former of whom will take three parts, and the latter one, *Macn. Prec.* p. 142, *Cas.* lxxiii.

This case exemplifies the doctrine of the return (see *Prin.* 93, *ante*, p. 103), or second division. The property should originally be made into six, the share of the half-sister by the same father only, being one-sixth with the uterine sister, and the legal share of the uterine sister being one-half (see *Prin.* 23, *ante*, p. 32, and 27, *ante*, p. 32). But the sixth of that number (six) is one, and the half is three; consequently, by making the entire estate into four parts, and giving three to the uterine, and one to the half-sister, each will obtain her proper share, *ib. note*.

The Third Division.—In the *Sirajiyah*, p. 23, it is said, the third is, when in the first case there is any one to whom no return can be made; then give the share of him, or her to whom there is no return, according to the lowest *denominator*, and if the residue exactly quadrate with the number of persons who are entitled to a return it is well—as, if there be a husband, and three daughters; but if they do not agree, then multiply the measure of the number of the persons, if there be an agreement between the number of persons, and the residue, into the denominator of the shares of those to whom no return is to be made, as, if there be a husband, and six daughters; if not, multiply the whole number of the persons into the denominator of the share of those to whom there is no return, and the product will set the case right.

Sir W. H. Macnaghten (*Prin.* 94) says: "Thirdly. Where

there is only one class of sharers associated with those, not entitled to claim the return, as in the instance of three daughters, and a husband, in which case the whole estate must be divided into the smallest number of shares of which it is susceptible, consistently with giving the person excluded from the return his share of the inheritance (which is in this case four), and the husband will take one, as his legal share, or a fourth, the remaining three going to the daughters as their legal shares, and as the return; but if it cannot be distributed without a fraction, as in the case of a husband, and six daughters (three not being capable of division among six), the proportion must be ascertained between the shares, and sharers, thus: $3 \times 2 = 6$, which agreeing in three, the rule is, that the number four, into which the estate was intended to be distributed, must be multiplied by two, that is, the measure, or a third of the number of those entitled to the return. Thus: $4 \times 2 = 8$, of which the husband will take two, and the daughters six, or one each; and if, on a comparison as above, the result should be prime, as in the case of a husband and five daughters, the number four, into which it was intended to distribute the estate, must be multiplied by five, or the whole of the number of those entitled to a return, thus: $4 \times 5 = 20$, of which the husband will take five, and the daughters fifteen, or three each.

Mr. Baillie (*Inh.* p. 116) says: "When there is a husband or wife, and only one class of persons entitled to participate in the return, the estate is to be, in the first place, divided into the smallest number of parcels which will admit of the extraction of the share of the person who is not entitled to participate, and such share is to be deducted. No further operation is necessary, if the remainder be divisible amongst the sharers without a fraction. Thus, if the deceased has left a husband and three daughters, the share of the former being a fourth, the smallest number of parcels into which the estate must be divided for its extraction, is four; and when the husband has taken his fourth, there remain three-fourths, which are divisible amongst the daughters without a fraction. But if there are six daughters instead of three,

the remaining parcels cannot be divided amongst them without a fraction. The parcels, and the number of individuals entitled to them, are, however, commensurable by three; and we therefore, according to the rule which has been so often explained, divide the number of the individuals by the common measure, and multiply the extractor by the quotient, thus: six divided by three gives two, which being multiplied by four, the product is eight parcels, and deducting two for the husband, there remains six for the daughters, or one to each. If there is no common measure of the remaining parcels, and of the number of individuals who are to receive them, we must multiply the extractor by the whole number; thus, if we substitute five daughters for six in the last case, the three parcels which remain, after the fourth of the husband has been deducted, cannot be divided amongst them without a fraction, and there is obviously no common measure of three, and five. We accordingly multiply the extractor, four, by five, and the product, twenty, is the number of parcels into which the estate is to be divided; one fourth, or five parcels, being the portion of the husband, and the remaining fifteen being that of the daughters, or three parcels to each."

Of a Daughter with a Husband.—Property purchased by a married woman with her own money is exclusively her own, notwithstanding the insertion of her husband's name in the title-deed, because it is a maxim of the law that regard is had to the real, and not to the nominal state of the case, and, according to this supposition, the husband had no right whatever to make over the property to the second wife by gift; and supposing that there were no other heirs, it should, on the death of the first wife (who was the proprietor) have been made into four portions, of which three belonged to her daughter by the former marriage, and one to her second husband, *Macn. Prec.* p. 145, Cas. lxxvii.

This is an example of the doctrine of the return, agreeably to that laid down for the third class of persons entitled to share the return. See *Prin.* 94; *ante*, p. 105, *ib. note*.

Of a Widow with a Daughter.—Where a man leaves a widow and a daughter, the property will be made into eight

parts, of which the widow will take one, and the daughter the remaining seven, always assuming that the deceased left no residuary heirs ; should there be any persons of this description, the daughter will take four shares only, and the remaining three will be made over to the residuary heirs, *Macn. Prec.* p. 144, Cas. lxxvi.

There being a child, the share of the widow is one-eighth, and the daughter being the only child, her legal share is half of the whole property ; but, as neither the wife, nor the husband is entitled to any return, it is requisite that the three surplus shares should revert to the daughter, if there be no other residuary heirs ; if there be any, they, of course, take the surplus three shares, and the daughter obtains only her legal share, which is one-half, or four parts out of eight. See *Prin.* 94, *ante*, p. 105. The smallest number of shares into which the estate can be divided, consistently with giving the widow her share, is eight, *Macn. Prec.* p. 145, *note*.

Of a Widow with a Mother.—Of Brother's Daughters with a Widow and a Mother.—Where a person leaves a mother, a widow, and two daughters of his uterine brother, the estate, after defraying the necessary expenses, should be made, in the first instance, into twelve* parts. But being a case in which the return operates, the twelve parts should be reduced to four, to one of which the widow is entitled, and the mother will take the remaining three, as her legal share, and, on account of there being no other residuary heir, as the return also. The daughters of the uterine brother of the deceased are enumerated among the distant kindred, and they can never take any share of the property, so long as there is a legal sharer, *Macn. Prec.* p. 144, Cas. lxxv.

Of a Widow with Two Daughters.—Where a widow, and two daughters survive, the whole property will be

* The mother's share being one-third, by *Prin.* 34, *ante*, p. 31, and the widow's one-fourth, by *Prin.* 14, *ante*, p. 33, the property should, by *Prin.* 65, *ante*, p. 58, be made into twelve parts ; but being a case of return, it should be reduced to the smallest number of which it is susceptible, consistently with giving the person excluded from the return her share of the inheritance ; which being in this instance one-fourth, the property should be made into four. See *Prin.* 94, *ante*, p. 105, *Macn. Prec.* p. 144, *note*.

divided into sixteen shares, of which two shares will go to the widow and seven to each of the daughters, *Macn. Prec.* p. 143, Cas. lxxiv.

This also is a case exemplifying the doctrine of the return. There being one of the heirs not entitled to a return, the calculation has been made agreeably to that laid down for the third class of persons entitled to share in the return. See *Prin.* 94, *ante*, p. 105.

Thus the smallest number into which the estate can be divided, consistently with giving the widow (who is not entitled to a return) her share of the inheritance (which is an eighth), is eight; but, after she has taken her share, there remain seven to be divided among the heirs entitled to a return, which obviously cannot be done without a fraction. In this case the proportion between the number of those entitled to a return, and of the number of shares left for them, must be ascertained. Thus : $2 \times 3 = 7 - 1$, which giving a *mootu-bayun*, or prime result, the number eight, into which the estate was originally divided, must be multiplied by the whole of the number of those entitled to a return. Thus : $8 \times 2 = 16$. It should here be observed, that neither the husband, nor wife has any legal claim to the return, and when they are associated with other heirs the surplus reverts exclusively to such heirs, *Macn. Prec.* p. 143, *note*.

The Fourth Division.—In the *Sirajiyah*, p. 24, it is said, the fourth is when, in the second case, there are any to whom no return is made : then divide what remains from the denominator of the share of him, or those who have no return, by the case of those to whom a return must be made, and if the remainder quadrates it is well, and this is in one form ; that is, when a fourth goes to the wives, and the residue is distributed in thirds among those entitled to a return—as, if there be a wife and a grandmother, and two sisters by the mother's side ; but if it do not quadrate, then multiply the whole case of those who are entitled to a return into the denominator of the share of him, or her who is not entitled to it, and the product will be the denominator of the shares of both classes—as, if there be four wives, and nine daughters, and six female ancestors, then multiply the shares of those

to whom no return must be made into the case of those who are entitled to a return, and the shares of those to whom a return is to be made, into what remains of the denominator of the share of those who are not entitled to a return. If there be a fraction in some, adjust the case by the before-mentioned principles.

Sir W. H. Macnaghten (*Prin.* 95) says:—"Fourthly. When there are two or more classes of sharers associated with those not entitled to claim the return, as in the instance of a widow, four paternal grand-mothers, and six sisters by the same mother only; in which case the whole estate must be divided into the smallest number of shares of which it is susceptible, consistently with giving the person excluded from the return her share of the inheritance (which is, in this case, four). Then, after the widow has taken her share, there remain three to be divided among the grand-mothers, and half-sisters; but the share of the grand-mothers is one-sixth, and of the half-sisters one-third, and here, to give them their portions, the remainder should be made into six; but a third, and a sixth of this number amount to three, which agrees with the number to be divided among them, of which the half-sisters will take two, and the grand-mothers one. Had there been only one grand-mother, and only two half-sisters, there would have been no necessity for any further process, as the grand-mother would have taken one-third and the two half-sisters the other two-thirds. But it is obvious that two shares cannot be distributed among the six half-sisters, nor one among the four paternal grand-mothers, without a fraction. To find the number into which the remainder should be made, recourse must be had to the seventh principle of distribution, *ante*, p. 85. The proportion between the shares and the sharers respectively must first be ascertained, thus: $2 \times 3 = 6$, which being composite, or agreeing in two, and $1 \times 3 = 4 - 1$, which, being prime, the whole of one set of sharers must be compared with the half of the other, thus: $3 = 4 - 1$, which also being prime, one of the numbers must be multiplied by the other, thus: $3 \times 4 = 12$; and having found this number, it must be multiplied into that of the original division, thus: $4 \times 12 = 48$,

of which the grand-mothers get twelve, or three each, twelve being to forty-eight, as one to four, and the half-sisters twenty-four, or four each, twenty-four being to forty-eight, as two to four, and the widow will take the remaining twelve. It is different if the shares of the persons entitled to a return, do not agree with the number left for them, after deducting the share of the person not entitled to a return, as in the case of a widow, nine daughters, and six paternal grand-mothers. Here the property must, in the first instance, be made into eight shares, being the smallest number of which it is susceptible, consistently with giving the widow her share. Then, after the widow has taken her share, there remain seven to be divided amongst the daughters and the grand-mothers; but the share of the grand-mothers is one-sixth, and of the daughters two-thirds; and here, to give them their portions, the property divisible amongst them should be made into six parts; but a sixth, and two-thirds of this number amount to five, which disagrees with the number to be divided among them. In which case the rule is, that the number of shares of those entitled to a return must be multiplied by the number into which it was necessary to make the property originally, thus: $8 \times 5 = 40$, of which the widow will take five, the daughters will take twenty-eight, and the grand-mothers seven. But it is obvious that twenty-eight cannot be distributed among the nine daughters, nor seven among the six paternal grand-mothers, without a fraction. To find the number into which the remainder should be distributed, recourse should be had to the sixth principle of distribution (*ante*, p. 83). The proportion between the shares, and the sharers respectively must first be ascertained, thus: $9 \times 3 = 28 - 1$, and $6 = 7 - 1$, both of which being prime, the whole of one set of sharers must be compared with the whole of the other set. Thus: $6 = 9 - 3$, which being concordant, or agreeing in three, the rule is that the third of one of the numbers must be multiplied into the whole of the other, thus: $3 \times 6 = 18$; and having found this number, it must be multiplied into that of the preceding result, thus: $40 \times 18 = 720$, of which the daughters will get 504, or fifty-six each, 504 being to 720, as twenty-eight

to forty; the grandmothers will get 126, or twenty-one each, 126 being to 720, as seven to forty; and the widow will get the remaining ninety.

Mr. Baillie, *Inh.*, p. 117, says: "When there is a husband, or wife, and two, or three classes of persons who are entitled to the return, the share of the person who has no right to participate in it, is first to be extracted, as in the last case."

When the remaining Parcels or Sharers Quadrate or are Commensurable.—And if the remaining parcels quadrate with the number of sharers, there is no necessity for any further process than to distribute them amongst them. But this can occur only in one case, that is, where the share of the person who is not entitled to participate in the return is a fourth, and there are three-fourths to be returned amongst the sharers. As where the deceased has left a widow, a grandmother, and two half-sisters by the mother, the share of the widow being a fourth, in such circumstances four is the smallest number of parcels into which the estate can be divided, so as to admit of its being extracted; and the share of the grand-mother being a sixth, while that of the two sisters is exactly double, or one-third, the three remaining parcels are obviously divisible amongst them without a fraction. *Bail. Inh.* p. 118.

When the remaining Parcels and Sharers do not Quadrate, or are Incommensurable.—If the parcels which remain after deducting the share of the person who is not entitled to participate in the return, do not quadrate with the shares of the persons who are entitled to participate, multiply the extractor of the case by the aggregate of these shares, and the product will be a number of parcels, out of which it will be found that all the shares may be extracted without a fraction. Thus, where the sole heirs of the deceased are a wife, two daughters, and a grand-mother, the share of the first, in such circumstances, being an eighth, the least number of parcels into which an estate must be divided is eight, and after setting apart one for the widow, seven remain for the daughters, and grand-mother. The share of the daughters being two-thirds, and that of the grand-mother a sixth, the

aggregate of the shares, when reduced to fractions of the same denomination, is five; and as seven parcels cannot be distributed amongst five sharers without a fraction, multiply the extractor, or eight, by five, and the product, forty, is the number of parcels into which the estate must be divided; of these one-eighth, or five parcels, belong to the widow, and of the remaining thirty-five, four-fifths, or twenty-eight parcels, are the property of the daughters, and one-fifth, or seven parcels, that of the grand-mother, *ib.*

“If, instead of one wife, and one grand-mother, as in the preceding illustration, we suppose that there are several of each, and also enlarge the number of daughters, the process will be the same, as far as relates to the doctrine of the return, but the case must be further subjected to the operation of some of the rules mentioned in the Chapter on the Rules of Distribution amongst numerous kindred, *ante*, p. 59. Thus, if the deceased had left four widows, nine daughters, and six grand-mothers, the shares would be the same as in the last case, though divisible amongst a greater number of individuals. The portion of the widow being five-fortieths, that of the daughters twenty-eight, and the portion of the grand-mothers seven, we first, according to the second rule, consider if there be any common measure of the classes, and the individuals composing them. But there is no common measure of five and four, nor of twenty-eight and nine, nor of seven and six, and we are obliged to operate with the whole numbers. We next compare the individuals in the different classes with each other, and we find the common measure, two, of the number of widows, and the number of grand-mothers. Dividing six by two, and multiplying the quotients by four, according to the first rule, we have the product, twelve, which we proceed, under the same rule, to compare with the number of daughters, and find that the numbers are measured by three. By dividing, and multiplying as before, we obtain the product, thirty-six, which (following the same rule and) multiplying by forty, the extractor of the case, the result is 1,440 parcels, into which the estate must be divided before the portions of the respective individuals can be extracted without a fraction. Having multiplied the denominators of the

fractions which represent the shares by thirty-six, we must, of course, increase the numerators in the same ratio, and have thus, $5 \times 36 = 180$ parcels for the portion of the widows, or 45 to each; $28 \times 36 = 1,008$ parcels for the daughters, or 112 to each; and $7 \times 36 = 252$ parcels for the portions of the grand-mothers, or 42 to each."—*Bail. Inh.* 119.

CHAPTER IX.

VESTED INHERITANCES.

Definition of—Right of representation—Rights of pre-deceased husband's heirs—Rules of distribution—Example—When the heirs of the deceased heir are the same as the original heirs, one partition suffices—Where they are different, but deceased's share is divisible without a fraction—Where it is not so divisible, but there is a common measure—Where there is no common measure—The case of a widow with two daughters, and the daughter of another daughter's son, the proprietor's son having died before his deceased sister, and her son—Case of a daughter, with a son and uncle, the son dying before distribution—Case of a son, four daughters, and a husband, the son dying before distribution—Of a sister with a widow—Of a daughter with a son's widow, the son dying after his father—Of a daughter with a son's widow, the son dying after the father, but leaving a daughter, who is also dead—Of a widow, three sons, and three daughters, and the daughter of another wife, and the widow, two sons, one daughter, and the daughter of the other wife dying successively—Of three sons, with three daughters, and a widow—Of a brother, with a widow, and four daughters, the widow dying before the distribution—Of four sons, with two daughters, and two widows—Of a son, with stepsons—Of a husband, with a brother and sister—Of two wives, a son by the first, a son and two daughters by the second, and two sons by another marriage, the two wives and one of the daughters dying successively, the latter leaving a husband—Of a widow, two daughters, and a son, one of the daughters, the widow, and son (leaving a widow and a son), and lastly the grandson, successively dying. Authorities for widow's succession—For daughters'—Sisters'—Mothers'—For the return—Of a brother and sisters, with widow's mother and brother, the widow having died before the distribution—The case of a son, four daughters, a widow, and three sons of another son, who died before the distribution—Of two sons, a daughter, and the widow of another son, who died before the distribution—Case of a husband and son, the husband dying before the distribution, and leaving a widow, another son, and four daughters—Of a widow, three sisters, and a paternal uncle's son, two of the sisters dying prior to the distribution, each leaving a daughter.

Definition of Vested Inheritances.—The estate of a person vests on his death in his surviving heirs, who are entitled to succeed to it immediately. See ante, p. 23.

No Right of Representation.—The right of representation—*i.e.* the right to represent a son of the deceased, who had died before him or her—is not recognized, the nearer of them exclude the more remote, *V. Sadagopal Charloo, Man. Mah. Civil Law*, § 10. The Mahomedan doctors assign as a reason for denying the right of representation, that a person has not even an inchoate right to the property of his ancestor until the death of such ancestor, and that consequently, there can be no claim through a deceased person, in whom no right could by any possibility have been vested, *Macn. Prelim. Remarks*, ix.

The son of a person deceased shall not represent such person if he died before his father. He shall not stand in the same place as the deceased would have done, had he been living, but shall be excluded from the inheritance if he have a paternal uncle, or uncles. For instance A, B, and C, are grandfather, father, and son. The father, B, dies in the lifetime of the grandfather, A. In this case the son C, shall not take *jure representationis*, but the estate will go to the other sons of A, *Macn. Prin.* 9; *ib. Prec.* p. 101, *Cas.* xxv. If a man leaves as his only relations one son and a grandson, through a deceased son, the surviving son will take all, and the grandson cannot claim as the representative of his deceased father. A woman has two sons, one of whom dies in the lifetime of his mother, leaving a daughter; after the grand-mother's death the grand-daughter claims the property left, in her father's right. The grand-daughter has no claim against her uncle, because her father died in the lifetime of his mother, who had another son living, by whom the daughter is excluded; she has therefore no claim of inheritance to the property of her grand-mother, *Macn. Prec.* p. 88, *Cas.* ix. The child of a Mahomedan who died in his father's lifetime is not entitled to inherit. 15th Feb., 1820, *East's No. of Cases*, 113, *Sup. Ct. Cal.* "A Mahomedan cannot inherit with his paternal uncle, if his father died before his grandfather. 17th Aug. 1824, 3 *S. D. A. Beng. R.* 403.*

* The then existing Government deprived the original ancestor of the parties of the estates which were received under another Govern-

V. Sudagopah Charloo, Man. Mah. Civ. Law, § 10, illustrates it thus: If A dies, leaving behind him three sons, and a grandson, by a fourth (son) deceased, during A's lifetime, the grandson is excluded by the surviving sons of A, because A's property could not vest in his deceased son, during A's lifetime; but if any of these sons happen to die subsequent to its vesting, though before its actual distribution, his descendants succeed by representation to the share he would have obtained had distribution taken place during his lifetime.

Rights of Pre-deceased Husband's Heirs.—Whatever may be the position, and rights of a husband being the only surviving heir of his wife, according to Mahomedan law, there is no representation in matters of succession, and therefore those rights do not descend to the heirs of a husband who has pre-deceased the wife, and who are themselves no relations of the wife. In fact, under the Mahomedan system, after the dissolution of a marriage contract by death, or otherwise, the parties, or their heirs bear no more relation to one another, than the heirs of *quondam* partners in some mercantile house, *Muss. Ekin Beebee v. Meer Ashruf Ali*, 1 W. R. Civ. Rul. 152. Cal.

Rules of Distribution.—*Macn.* says: "Where a person dies, and leaves heirs, some of whom die prior to any distribution of the estate, the survivors are said to have vested interests in the inheritance; in which case the rule is, that the property of the first deceased must be apportioned among his several heirs living at the time of his death, and it must be supposed that they have received their shares accordingly."—*Macn. Prin.* 96.

The same process must be observed with reference to the property of the second deceased, with this difference, that the proportion must be ascertained between the number of shares, to which the second deceased was entitled at the first distribution, and the number into which it is requisite to distribute his estate to satisfy all the heirs, *Macn. Prin.* 97.

If the proportion should appear to be prime, the rule is ment by the descendants of one of his sons. The descendants of another son have no right to participate, 3 S. D. A. Beng. 403.

that the aggregate, and individual shares of the preceding distribution, must be multiplied by the whole number of shares into which it is necessary to make the estate at the subsequent distribution, and the individual shares at the subsequent distribution must be multiplied by the number of shares to which the deceased was entitled at the preceding one, *Macn. Prin.* 98.

If the proportion should be concordant, or composite, the rule is, that the aggregate and individual shares of the preceding distribution must be multiplied by the measure of the number of shares, into which it is necessary to make the estate, at the subsequent distribution, and the individual shares at the subsequent distribution must be multiplied by the measure of the number of the shares to which the deceased was entitled at the preceding distribution, *Macn. Prin.* 99.

Example.—For instance, a man dies, leaving A, his wife, B, and C, his two sons, and D, and E, his two daughters. A, and D, died before the distribution, the former leaving a mother, and the latter a husband, *ib.* 100.

At the first distribution the estate should be made into forty-eight shares, of which the widow will get six, the sons fourteen each, and the daughters seven each. On the death of the widow, leaving a mother, and four children, her estate should, in the first instance, be made into thirty-six parts, of which her mother is entitled to six, the sons to ten each, and the daughters to five each. But being a case of vested inheritance, it becomes requisite to ascertain the proportion between the number of shares to which she was entitled at the preceding distribution, and the number into which it is necessary to make the estate.

Thus: $6 \times 6 = 36$, which proving concordant, or agreeing in six, the rule is, that the aggregate and individual shares of the preceding distribution be multiplied by six, or the measure of the number into which it is necessary to make the estate at the second distribution.

Thus: $48 \times 6 = 288$, and $14 \times 6 = 84$, and $7 \times 6 = 42$; but the measure of the number to which the deceased was entitled at the preceding distribution was only one; it is

needless to multiply by it, the shares at the second distribution. On the death of one of the daughters, leaving her two brothers, her sister, and a husband, her estate should, in the first instance, be made into ten parts, of which her husband is entitled to five, her brothers to two each, and her sister to one; but being a case of vested inheritance, it becomes requisite to ascertain the proportion between the number of shares to which she was entitled at the preceding distribution, and the number into which it is necessary to make her estate; but she derived forty-seven shares from the preceding distributions (five at the second and forty-two at the first). Thus: $10 \times 4 = 47 - 7 = 10 - 3$, and $3 = 7 - 4$, and $3 = 4 - 1$, which proving prime, or agreeing in an unit only, the rule is, that the aggregate and individual shares of the preceding distributions be multiplied by ten, or the whole number of shares into which it is necessary to make the estate at the third distribution.

Thus: $288 \times 10 = 2,880$, and $84 \times 10 = 840$, and $42 \times 10 = 420$, and $6 \times 10 = 60$, and $10 \times 10 = 100$, and $5 \times 10 = 50$. Then the shares at the third distribution should be multiplied by the number of shares to which the deceased sister was entitled at the preceding distributions.

Thus: $5 \times 47 = 235$, and $2 \times 47 = 94$, and $1 \times 47 = 47$; therefore of the 2,880 shares the son B, will get $840 + 100 + 94 = 1,034$; the son C, $840 + 100 + 94 = 1,034$; the daughter, E, $420 + 50 + 47 = 517$; the mother of A, 60, and the husband, D, 235.

When the Heirs of the Deceased Heir are the same as the Original Heirs, one Partition suffices.—Thus, when the heirs are sons and daughters, and one of them dies, he or she has no other heirs than the surviving brothers, and sisters, and the property is divisible amongst the survivors in the proportion of two shares to a male and one to a female.

Rule of Partition when they are Different, but the Deceased's Share is divisible without a Fraction.—When, amongst the heirs of the second deceased, there are some who are not heirs of the first deceased, the estate of the first deceased is to be divided, to ascertain the share of the second deceased, and the estate of the second deceased is to be

divided amongst his heirs ; and if his share can be divided amongst them without a fraction, there is no necessity for any further operation.

Rule when it is not so Divisible, but there is a Common Measure.—Mr. Baillie, *M. L.* p. 710, says : “ If the share of the second deceased is not divisible amongst his heirs without a fraction, but there is a common measure between the share, and the parcels into which it is divisible, reduce both to their lowest terms, and multiply the number of parcels in the first estate by the lowest term of the number of parcels in the second, and the product will resolve the case. Then, in order to ascertain the share of each of the heirs of the first deceased, multiply his share in that estate by the lowest term of the parcels in the second ; and to ascertain the share of each of the heirs of the second deceased, multiply his original share in it by the lowest term of the share of the second deceased in the estate of the first deceased. Thus, a person dies, leaving a son and a daughter, and before a partition is made of his property the son dies, leaving a widow, a daughter, and three grandsons (son’s sons) ; the estate of the first deceased is divisible into three parts, whereof two, or the son’s share, must be divided into eight parcels, of which his widow has an eighth, or one parcel, his daughter a half, or four parcels, and his grandsons the remaining three. But two cannot be divided into eight parts without a fraction. There is, however, a common measure, two, between them, and reducing each to their lowest terms, the result is one, and four. Now multiply the parcels of the first deceased, or three, by the lowest of the parcels of the estate of the second deceased, or four, and the product will be twelve, which will resolve the case. To ascertain the son’s share in the estate of the first deceased, multiply his original share, which was two, by the lowest term of the parcels of the second estate, which was four, and the product, or eight, is his share out of twelve ; and following the same course for the daughter’s share, it is four parcels out of twelve. To ascertain the widow’s share, which is an eighth, or one, multiply that by the lowest term of the second deceased’s share in the estate of the first deceased, which is

one also, and her share is one out of twelve parcels; and following the same course with the daughter, and the grandsons respectively, her share is found to be four, and theirs three, or one to each."

Rule when there is no Common Measure.—"If there is no common measure between the share of the second deceased in the estate of the first, and the parcels into which the share must be divided, multiply the number of parcels of the first estate, by the number of parcels in the second, and the product will satisfy the case. Then, to ascertain the portion of each one of the heirs of the first deceased, multiply his original share by the number of parcels in the second estate; and to ascertain the portion of each one of the heirs of the second deceased, multiply his original share by the share of the second deceased in the estate of the first. Thus, a person dies, leaving a son, and a daughter, and before a partition of the estate is effected the son dies, leaving a son, and a daughter. Here the first estate is divisible into three portions, whereof the son's share is two; but he dies, and his estate is also divisible into three portions; three is accordingly to be multiplied by three, and the product, nine, will satisfy the case. Then, to ascertain the son's portion in the estate of the first, multiply his original portion, or two, by the number of parcels in his own estate, or three, and the product, six, is his portion. In like manner, to ascertain his son's portion, multiply his original share in the second estate, which is two, by his father's share in the first, which was two also, and the result is four; and following the same course for the daughter's portion, it is found to be two." The same process should be adopted, if any of the heirs of the second deceased should die before his estate is divided amongst his heirs.

Case of a Son's Widow with two Daughters and the Daughter of another Daughter's Son, the Proprietor's Son having died before his deceased Sister and her Son.—W. had three wives. By his first wife (M, F,) he had a son (R, A,) and a daughter (F,); by his second he had a daughter (B,), and by his third a daughter (S.). After his death S, died, Q, A, her son, having pre-deceased her.

consisting of five shares, it is impracticable to distribute in this manner, without a fraction. A higher number must therefore be sought: as 1 is to 5, so is 6 to 30, of which the son will be entitled to twenty, and the daughter to ten. On the death of the son, his whole property goes to his widow, in satisfaction of dower. On the death of the daughter of the third widow, her property should have been divided into four parts, of which two would go to the daughter of her son, and one to each of her half-sisters. But her whole property consisting of twenty-six shares, it is impracticable to distribute in this manner without leaving a fraction; a higher number must therefore be sought: as 1 is to 26, so is 6 to 156. Of this number seventy-eight shares will go to the granddaughter, and thirty-nine to each of the half-sisters. But it having been found necessary to make an increase with respect to one share, it becomes necessary to increase all the shares proportionally. Thus: as 1 is to 120, so is 6 to 720. Thus, the share of the widow of R. A. will be $42 \times 6 + 20 = 272$; the share of B. will be $26 \times 6 + 39 = 195$; and the share of F. will be $21 \times 6 + 10 + 39 = 175$. The remaining seventy-eight shares go, as was before stated, to the grand-father. On this calculation, it is supposed that the distribution did not take place until after R. A.'s death, and that he died before his half-sister, S.; which circumstance (as he himself could not inherit from S.) precludes his widow from a share of her property.

But in the event of S. dying before R. A., her granddaughter will get half, and the remainder will be distributed between her two half-sisters, and her half-brother (R. A.), in the proportion of two to one, to the brother; but S.'s share consisting of twenty-six, it is plain that this distribution cannot be made without leaving a fraction. A higher number must therefore be sought: as 1 is to 26, so is 12 to 312. Of this number, 156 shares will go to the grand-daughter, seventy-eight to the half-brother, and thirty-nine to each of the half-sisters. But it is necessary to increase the other shares proportionally. Thus, as 1 is to 120, so is 12 to 1,440. The shares of R. A., and consequently of his widow, will then be $42 \times 12 + 40 + 78 = 622$; the share of B. will be $26 \times 12 + 39$

$= 351$; the shares of F. will be $21 \times 12 + 20 + 39 = 311$. The remaining 156 shares go, as was before stated, to the granddaughter, *Macn. Prec.* p. 147, *note*. The above is not a very scientific process, and would, in most instances, involve greater trouble than a recourse to the prescribed rules, which are illustrated in the following cases :—*ib.*

Case of a Daughter, with Son and Uncle, the Son dying before Distribution.—Where a son, a daughter, and a half-brother by the same father only, survive ; after the father's death the son died childless, and the daughter, during the lifetime of her paternal uncle, took possession of the estate. The share of the daughter is two-thirds, that of the paternal half-uncle one-third—*i.e.* the property will be divided into three parts, of which two will go to the former, and one to the latter, as residuary heir, *Macn. Prec.* p. 148, *Cas.* lxxix.

This is a simple example of the doctrine of vested inheritance (see *Macn. Prin. Vest. Inh.* 96, 97, 99, *ante*, pp. 117, 118). At the distribution which should have taken place on the death of the original proprietor, his brother (see *Prin. Inh.* 21, *ante*, p. 32) was not entitled to any part of the property left by him, there being a son. His property should then have been made into three parts, of which the son was entitled to two, and the daughter to one. On the death of the son, his two shares should be compared with the number of shares into which it is requisite to make his estate, which is in this case two, the sister's share (see *Prin.* 23, *ante*, p. 32) being one moiety, and the other moiety going to the paternal half-uncle (brother of the original proprietor), as residuary heir. Two and two are concordant ; but the measure of the number of shares being half, or only one, the multiplication directed in Principle 99, *ante*, p. 118, is of course needless, *Macn. Prec.* p. 148, *note*.

Case of a Son, four Daughters, and a Husband, the Son dying before the Distribution.—Where a woman leaves as her heirs, four daughters, one son, and a husband, the son dying previously to any distribution of the property, leaving his four sisters, and his father. According to law, if the whole property belonged to the deceased woman, it should, in the first instance, have been applied to her

funeral expenses (and debts), then to the payment of the legacies out of a third of the residue, and, after such payment, if there remained any surplus, it should have been made into eight shares, of which four should go to her husband, and the remaining four to her four daughters, or one share to each of them, *Macn. Prec.* p. 149, Cas. lxxx.

At the distribution which should have taken place on the death of the original proprietor, her^{*} heirs being her husband, her son, and four daughters, her property should have been made into eight parts, of which the husband was entitled to two shares, and her four daughters to the remaining four shares, or one share each. At the distribution which should have taken place on the death of the son, his sole heir was his father, who was entitled to take his two shares,* which he inherited from his mother, without making any provision for his sisters out of it.

Consequently the property should be made into eight parts, of which the husband will take four—that is to say, two which he inherited from his wife, and the other two from his son—and the daughters the remaining four, or one share each, which they inherited from their mother, *Macn. Prec.* p. 149, *note*.

1. Of a Sister with a Widow.—Where a deceased person divided his estate equally between his son, and daughter, during his lifetime, the son died afterwards, leaving a sister, and a wife ; according to law, the estate of the son should be made into four shares, of which one will go to the widow, and the remaining three to the sister of the deceased.

2. Of a Daughter with a Son's Widow, the Son dying subsequently to his Father.—Supposing the first person to have died, without having made any division of his estate, leaving a son and daughter, and the son to die subsequently, leaving a wife, the property still remaining undivided ; in the first instance, the property of the father will be made into three shares, of which two belonged to the son, and one to the daughter ; afterwards, of the four shares belonging to the son (his two shares having been raised to four) three will go to his sister, and one to his wife. Therefore the whole estate of the father should be made into six parts, of which one

should be awarded to the widow of his son, and five to his daughter.

3. Of a Daughter with a Son's Widow, the Son dying subsequently to the Father, but leaving a Daughter, who is also dead.—Supposing the wife of the son to have had a daughter by her husband, and the daughter died at the age of five years. The property of the father will be made into three shares, of which the son will take two, and the daughter one; and on the death of the son, his two shares will be made into eight, of which one will go to his widow, four to his daughter, and three to his sister; and on the death of the daughter, the four shares appertaining to her will devolve on her mother. The whole estate, therefore, of the father should be made into twelve parts, of which five should be awarded to the widow of the son, and seven to his daughter, *Macn. Prec.* p. 150, Cas. lxxxi.

These cases afford very easy examples of vested inheritance. At the first distribution the estate should have been divided into three parts, to give the son twice as much as the daughter. At the second distribution the estate of the son should have been made into four parts, the share of the wife being one-fourth. But being a case of vested inheritance, the proportion must be ascertained between the number to which the deceased son was entitled and the number into which it is necessary to divide the estate. Thus: $2 \times 2 = 4$, which agreeing in two, the rule is (see *Prin.* 99, *ante*, p. 118), that the number of the shares of the original division (aggregate and individual) be multiplied by half the number of the portions of the second class of heirs, and these last by half the number of shares to which the deceased was entitled (which being in this case only one, multiplication is needless). Thus: $3 \times 2 = 6$, of which the widow will take one, and the daughter five, according to this table:—

Propositus: $3 \times 2 = 6$.

A.		B.
Son.		Daughter.
4.		2.
	Son, 4.	
C.		B.
Son's widow.		Sister.
1.		3.

So also in the third case, at the second distribution, the estate of the son should have been made into eight, the share of the widow being one-eighth, and of the daughter being one-half; but two and eight also agree in two, and, agreeably to the principle quoted in illustration of the answer to the former case, three must be multiplied by four. Thus : $3 \times 4 = 12$, of which the son's sister takes seven, four in right of her father, and three in right of her brother; the son's daughter four, as her legal share of one-half; and the son's widow one, as her legal share of one-eighth. On the third distribution the whole estate of the daughter goes to the mother, and the sister's share is not increased according to this table.*

Propositus: $3 \times 4 = 12$.		
A. Son.		B. Daughter.
3.	A. Son. 8.	4.
B. Sister.	D. Daughter.	C. Widow.
3.	4.	1.

The case of a Widow, three Sons, three Daughters, and the Daughter of another Wife, and the Widow, two Sons, one Daughter, and the Daughter of the other Wife dying successively.—Where a person died, leaving his wife A; B, C, and D, his three sons, and E, F (by his wife A), and G, by another wife; after his death, and before the property is distributed, his widow A, two of his sons, B and C, and one of his daughters, G, successively die. The surviving heirs therefore are D, E, and F. The property of the original proprietor must be made into 1,728 shares, of which D, will get 864 shares, and E, and F, 432 shares each. The following table will exhibit the manner in which the surviving heirs succeed to the interests vested in them by the death of their relatives, who died subsequently to the original proprietor, but previously to the distribution being carried into effect: $72 \times 8 = 576 \times 3 = 1,728$.

* *Man. Prec.* p. 151, note.

Cases of three Sons with three Daughters and Widow :—

A.	B.	C.	D.	E.	F.	G.
9	14	14	14	7	7	7 = 72
	112	112	112	56	56	56
		336	336	168	168	168

Case of three Sons with two Daughters :—

A. Deceased.					
B.	C.	D.	E.	F.	G.
2	2	2	1	1	0 = = 8
18	18	18	9	9	
	54	54	27	27	

Case of two Brothers with two Sisters :—

B. Deceased.				
C.	D.	E.	F.	G.
2	2	1	1	0 = = 6
130	130	65	0	

Case of a Brother with two Sisters :—

C. Deceased.			
D.	E.	F.	G.
2	1	1	0 = = 4
260	130	130	

Case of a Half-brother and Half-sisters :—

G. Deceased.		
D.	E.	F.
84	42	42
Total.		
D.	E.	F.
864	432	432.*

This affords a good illustration of the rule respecting the succession to vested interests. With a view to distribute the property of the *propositus* in the first instance, recourse must be had to the third *Prin. of Dist.* (77, *ante*, p. 68). For, the widow having a right to one-eighth, it is evident the property cannot be made into less than eight shares; but besides her, there are nine claimants, one son being counted as two daughters; and after her eighth is withdrawn, it is obvious that the remaining seven shares cannot be distributed among the nine claimants without a fraction. It

* *Macn. Prec.* p. 152, Cas. lxxxii.

consequently becomes necessary to find the proportion between the sharers, and the shares, which appears to be, that they are divisible by an unit only, or that they are what is termed *mootubayun*, or prime. Thus : $7 = 9 - 2$, and $2 \times 3 = 7 - 1$, in which case the rule is, that the number of sharers must be multiplied into the total number of shares. Thus : $9 \times 8 = 72$, the product required.

Amongst the second class of sharers the first rule of distribution applies. The stepdaughter gets nothing, and by making the property into eight (the number of sharers, a male being counted for two females) it may be distributed without a fraction. But as the property of the widow was not distributed at the time of her death, it is necessary to find out the extent of the vested interest to which each heir is entitled. It is requisite that the proportion be ascertained between the aggregate of their shares, and the amount to which the widow was entitled at the preceding distribution, which is found to be nine. Thus : $8 = 9 - 1$. These numbers, therefore, are divisible by an unit only, or are *mootubayun*; in which case the rule is (see *Prin.* 98, *ante*, p. 117), that the aggregate and the individual shares of the first class should be multiplied by the aggregate of the shares of the second class. Thus : $72 \times 8 = 576$, and $14 \times 8 = 112$, and $7 \times 8 = 56$; after which the individual shares of the second class, must be multiplied by the aggregate of the shares of the second class. Thus : $72 \times 8 = 576$, and $14 \times 8 = 112$, and $7 \times 8 = 56$; after which the individual shares of the second class must be multiplied by the amount to which the widow was entitled at the preceding distribution. Thus : $2 \times 9 = 18$, and $1 \times 9 = 9$.

Among the third class of sharers also, the first rule of distribution applies, for the same reasons, and in order to ascertain the extent of the vested interest of each heir, the same process must be had recourse to. Thus B, the deceased, had 112 shares at the first distribution, and 18 at the second—total 130; but the aggregate of the sharers of the present class is six. The proportion between these two numbers is, that they agree in two, or are, as it is termed, *mootuwafiq*, or composite. Thus : $6 \times 21 = 130 - 4$, and $4 = 6 - 2$, in which case the rule is (see *Prin.* 99, *ante*, p. 118)

that the aggregate and individual shares of the first class, and the individual shares of the second class (as produced by the preceding results), should be multiplied by half the sum of the shares of the third class. Thus: $576 \times 3 = 1,728$, and $112 \times 3 = 336$, and $56 \times 3 = 168$, and $18 \times 3 = 54$, and $9 \times 3 = 27$; after which the individual shares of the third class must be multiplied by half the amount to which B was entitled at the preceding distribution. Thus: the half of 130 is 65, and $65 \times 2 = 130$, and 65 multiplied by 1 = 65.

Amongst the fourth class also the same rules apply. Thus, C, the deceased, had 336 at the first distribution, 54 at the second, and 130 at the third,—total 520; but $4 \times 130 = 520$, and the proportion is that they agree in four, or are, as it is termed, *mootudakhil*, or concordant; in which case the rule is (see *Prec.* 99, *ante*, p. 118) that the aggregate, and individual shares of the first class, and the individual shares of the second, and third classes, should be multiplied by a fourth of the sum of the shares of the fourth class; but one being the fourth of four, multiplication is needless. After which the individual shares of the fourth class must be multiplied by a fourth of the amount to which C, was entitled at the preceding distribution. Thus: The fourth of 520 is 130, and $130 \times 2 = 260$, and $130 \times 1 = 130$.

G, dying, of her 168 shares, her half-brother will take 84, and her half-sisters will take 42 each. Thus, the survivor D, will receive $84 + 260 + 130 + 54 + 336 = 864$, and E, will receive $42 + 130 + 65 + 27 + 168 = 432$, and F, will receive $42 + 130 + 65 + 27 + 168 = 432$.

Case of a Brother with a Widow and four Daughters, the Widow dying before the Distribution.—A person dies, leaving two sons, who are uterine brothers, and who divide the paternal estate equally, each retaining possession of his own share. Some years subsequent to the division of the inheritance, the younger son died, leaving a widow, and four daughters. The widow, on the death of her husband, took possession of his property, which she retained for several years, and no distribution of her husband's property took place during her lifetime. Of the deceased's daughters three were married, and one continued unmarried. After-

wards the widow died, but, four, or five years prior to her death, her husband's brother, and his son, and grandson took possession of the property left by her husband, and retained the exclusive enjoyment of it. It does not appear whether the possession was obtained forcibly, or by the consent of the widow. All the four daughters were living, and one of them claimed a fourth part of the property left by her deceased father, suing her eldest sister, who is the wife of her uncle's son, her uncle's son, and his grandson, who were in possession.

The original division of the estate between the two brothers was correct and proper. Now that disputes have arisen regarding the succession, the property of the deceased brother must be parcelled out in legal portions amongst the heirs, and for this purpose must be made into ninety-six shares, of which seventy-six will be allowed to the four daughters, and twenty to the brother, and the share of each daughter, whether married or unmarried, will be nineteen; consequently the claimant is entitled to nineteen out of ninety-six shares. It is a matter of no consequence whether the present possessors obtained the property by fair, or by foul means; as the law recognizes no proprietary right for which some title cannot be shown, such as acquisition by gift, or the like, which does not here appear to have existed, and such possession cannot bar the claimant's right. The husband of the claimant cannot, under any pretence, interfere in urging the claim preferred by her to her parent's property, the proprietary right to which is solely vested in herself, *Macn.* p. 155, *Cas.* lxxxiii.

This is a case of vested inheritance. The division of the deceased brother's estate originally, should have been by twenty-four, according to *Prin.* 66, *ante*, p. 59, but as the widow died before distribution, the number of shares to which she was entitled when she died, should be compared with the number of her heirs. Her shares amounted to three, and her heirs to four, but these being compared, give a *mootu-bayun*, or prime result, in which case the rule is (see *Prin. Vest. Inh.* 98, *ante*, p. 117), that the number of shares into which the property should first have been distributed, be multiplied

by the number of the heirs of the deceased. Thus : $24 \times 4 = 96$, of which number the daughters succeed to sixty-four, or two-thirds, in virtue of their own right of inheritance, and to twelve, or one-eighth, in right of succession to their mother.

The case of four Sons, with two Daughters and two Widows—Of a Son, with Stepsons—Of a Husband with a Brother and Sister—Of two Wives, a Son by the first, a Son and two Daughters by the second, and two Sons by another Marriage, the two Wives and one of the Daughters dying successively, the latter leaving a Husband.—A person dies, leaving two wives, four sons, and two daughters ; but the distribution of his estate did not take effect until after the death of his two wives, and one of his daughters. By his first wife he had only one son, and by his second wife he had one son, and two daughters. His other two sons were the offspring of another woman. The death of the first wife occurred before that of the second, and the death of the second, before that of the daughter, who left a husband. The property of the deceased must be made into eighty shares, of which one-eighth, or ten shares, will go to the widows, and they will take five each. The male issue will take double that of the female. Thus the sons will get fourteen shares each, and the daughters seven each. On the death of the first widow, her only son will be the sole heir to her property. The half brothers by the same father only, are excluded from participation. On the death of the second widow, her five shares (being multiplied by the number of shares into which they must be distributed) will be increased to twenty, of which her son will take ten, and her daughters five each ; and the shares of the preceding results will be multiplied by four, the number of shares of the present class. Thus the share of the son, on the death of the first widow will be $5 \times 4 = 20$; and so with the shares of the sons, and daughters on the death of the father : $14 \times 4 = 56$ (son's share), $7 \times 4 = 28$ (daughter's share), and the total number of shares $80 \times 4 = 320$. On the death of the daughter, her property, which consists of thirty-three shares, will be made into 198, of which her husband will be entitled

to one-half, or ninety-nine, and the other half will go to her whole brother, and her whole sister, in the proportion of a double share to the male. Thus the former will receive sixty-six, and the latter thirty-three shares. The half-brothers will be excluded from the participation. The preceding results must again be multiplied by six, the number of shares of the present class. Thus $10 \times 6 = 60$, and $5 \times 6 = 30$, and $20 \times 6 = 120$, and $56 \times 6 = 336$, and $28 \times 6 = 168$, and $28 \times 6 = 168$, and $320 \times 6 = 1,920$; and of this the son by the first wife will receive $336 + 120 = 456$, the son of the second wife $336 + 60 + 66 = 462$, the daughter by the second wife $168 + 30 + 33 = 231$; the two other surviving brothers will be entitled to 336 shares each, and the husband will take ninety-nine, as above stated, *Macn. Prec.* p. 157, Cas. lxxxiv.

Among the first class of sharers an example is exhibited of the fifth *Prin. of Dist. ante*, p. 79. The shares of the two widows is one-eighth by law, consequently the property must be made into eight shares at least, and eight must be assumed as the root of the case; but besides them, there are ten other claimants (one son always counting for two daughters). Here it will be observed that there remains a fractional division in the allotments of both the wives, and the children, for one share cannot be given to the two wives without a fraction, and after their share is taken away, the remaining seven cannot be distributed among the other ten claimants without a fraction. In this case, after finding the proportion between the wives, and their shares, and the children, and their shares (both of which prove to be *mootubayun*, or prime), it is requisite to find the proportion between the numbers of the shares respectively, which proves to be *mootudakhil*, or concordant—in other words, the smaller number exactly measures the greater, thus: $2 \times 5 = 10$, when the rule is (see *Fifth Prin. of Dist.* 79, *ante*, p. 79) that the greater number be multiplied into the root of the case, thus: $8 \times 10 = 80$. On the death of the first wife, her son being her only heir, no division takes place. On the death of the second wife (to conform to the rule, that a male shall have a portion double that of a female) her property must be made into four shares; but being a case of vested

inheritance, the proportion must be ascertained between the number of shares to which she was entitled at the first distribution, and the number into which her property is made on her decease. Those two numbers, four and five, are prime, or are divisible by an unit only, no third number measuring them both, in which case the rule is (see *Prin. Vest. Inh.* 98, *ante*, p. 117) that the shares (aggregate, and individual of the preceding result) be multiplied by the aggregate of the shares into which the property of the last deceased is made, thus: $80 \times 4 = 320$, and $5 \times 4 = 20$, and $14 \times 4 = 56$, and $7 \times 4 = 28$, and the individual shares of the present class be multiplied by the number of shares to which the deceased was entitled at the former distribution, thus: $2 \times 5 = 10$, and $1 \times 5 = 5$. At the third division, on the death of the daughter, to conform to the rules that the husband shall have a moiety where there are no children, and that a male shall have double the portion of a female, the property must be made into six shares at least; but being a case of vested inheritance, the same process must be observed as in the last case. The result of the comparison of the numbers will be the same, for thirty-three, and six are prime, thus: $6 \times 5 = 33 - 3$ and $3 = 5 - 2$ and $2 = 3 - 1$. On multiplication according to the preceding rule, the sum will be found to be 1,920; thus the preceding result, $320 \times 6 = 1,920$, *Macn. Prec.* p. 157, *note*.

Case of a Widow, two Daughters, and Son—One of the Daughters, the Widow and Son (leaving a Widow and a Son), and lastly the Grandson successively dying; **Authorities for Widow's Succession—For Daughters'—Sisters'—Mothers'—For the Return.**—Where the deceased left as his heirs a widow, a son, and two daughters, subsequently one of the daughters died, leaving no children, and next the widow of the proprietor died; the son of the proprietor then died, leaving a widow and a son; lastly, his grandson died. No distribution took place during the lifetime of the deceased persons: the question arose, how will the survivors—the daughter and the widow of the son of the original proprietor—share his property? It was answered: there are only surviving a daughter of the original proprietor, and a widow of

his son; the property will, in this case, be made into three shares, of which the widow of the son will take two, and the daughter the remaining one, because, when the original proprietor died, he left a widow, a son, and two daughters as his heirs. The widow's share was one-eighth of his property, and the remainder belonged to his son and daughters, in the proportion of two shares for the male, and one for the female; in other words, the son had a right to one-half, and the daughters to the other half, or a quarter each. On the death of one of the daughters, who left no issue, her share was to be made into three parts, of which two appertained to her brother, and the remaining one to her sister; and after the death of the widow of the original proprietor, her legal share was to be made into three parts, of which her son would take two, and the surviving daughter, one; and of the share of a son of the original proprietor, which he should have inherited from his sister and mother, one-eighth will go, at his death, to his widow, and the remainder to his son. On the death of his son (who was grandson of the original proprietor) his whole property will be vested in his mother, because she is entitled to one-third as her legal share, and to the remaining two as the return. Under this distribution, two-thirds of the property of the original proprietor will devolve on the widow of his son, and the remaining one on his daughter. It is laid down in the *Sirajiyya*: "Wives take in two cases; a fourth goes to one, or more on failure of children, and son's children, how low soever; and an eighth with children, or son's children, in any degree of descent."

So also, on the subject of the daughters' claim to inheritance: "Daughters begotten by the deceased take in three cases; half goes to one only, and two-thirds to two, or more; and if there be a son, the male has the share of two females, and he makes them residuaries."

So also, the same authority, treating of a sister's right, of inheritance: "If there be brothers by the same father, and mother, the male has the portion of two females, and the females become residuaries through him by reason of their equality in the degree of relation to the deceased."

And on the subject of the mother's claim of inheritance, it

is stated : “ The mother takes in three cases ; a sixth, with a child, or a son’s child, even in the lowest degree, or with two brothers, and sisters, or more, by which-ever side they are related ; and a third of the whole on failure of those just mentioned.”

And it is laid down in the same book of law, on the subject of the return : “ The return is the converse of the increase, and it takes place in what remains above the shares of those entitled to them ; when there is no legal claimant of it, this surplus is then returned to the sharers according to their rights,” *ante*, pp. 100, 102.

In this case of vested inheritance, the result must be arrived at by the following calculation :—

At the first distribution the property should have been divided into thirty-two parts (the heirs being a widow, a son, and two daughters, and the number eight, not being divisible amongst the claimants without a fraction), agreeably to the third *Prin. of Dist.* (77, *ante*, p. 68), of which parts the widow should have got four, the son fourteen, and the daughters seven each.

At the second distribution, on the death of one of the daughters, the heirs being her mother, brother, and sister, her property should have been made, agreeable to the third *Prin. of Distribution*, into eighteen parts (the number six, into which it was necessary to make the estate to give the mother her sixth, not being divisible amongst the claimants without a fraction), of which the mother was entitled to three, the brother to ten, and the sister to five ; but this being a case of vested inheritance, it became necessary to compare the number of shares which the daughter had at her death, with the number of shares into which her estate should be made, thus : $7 \times 2 = 14$, and $4 = 7 - 3$, and $3 = 4 - 1$, which giving a *mootubayun* or prime result, the rule is (see *Prin. Vest. Inh.* 98, *ante*, p. 117) that the aggregate, and individual shares of the first distribution must be multiplied by the aggregate of the shares of the second distribution, thus : $32 \times 18 = 576$, and $4 \times 18 = 72$, and $14 \times 18 = 252$, and $7 \times 18 = 126$; and the individual shares of the second class, must be multiplied by the amount

to which the daughter was entitled at the preceding distribution, thus : $3 \times 7 = 21$, and $10 \times 7 = 70$, and $5 \times 7 = 35$.

At the third distribution, on the death of the mother, her property should have been made, agreeably to the first principle of distribution, into three parts, of which her son was entitled to two, and her surviving daughter to one ; but being a case of vested inheritance, it becomes necessary to compare the number of shares which the mother had at her death, with the number of shares into which her estate should be made. Her shares, according to the preceding results, amounted to ninety-three—on the first distribution seventy-two, and on the second twenty-one ; and the estate should now be made into three, thus : $3 \times 31 = 93$, which gives a *mootud-akhil*, or concordant result, showing that the numbers agree in three, in which case the rule is (see *Prin. Vest. Inh.* 99, ante, p. 118) that the aggregate, and individual shares of the first distribution be multiplied by a third of the aggregate of the shares of the third distribution ; but the third of the aggregate in this case being only one, multiplication is of course needless, and the 93 shares, which were the property of the mother at her death, must be divided between her son, and her daughter, the former getting a double share, or sixty-two, and the latter thirty-one. This last result is obtained by multiplying the share of the son, and daughter (two and one) by thirty-one, or a third of the number (ninety-three), to which the widow was entitled.

At the fourth distribution, on the death of the son, his property should have been made, agreeably to the first principle of distribution, into eight parts, of which his widow was entitled to one, and his son to seven ; but being a case of vested inheritance, it becomes necessary to compare the number of shares which the son had at his death, with the number of shares into which his estate should be made. His shares, according to the preceding results, amounted to 384 (at the first distribution 252, at the second seventy, and at the third sixty-two), and the estate now should be made into eight, thus : $8 \times 48 = 384$, which gives a *mootudakhil*, or concordant result, showing that the numbers agree in eight ; in which case the rule is (see *Prin. Vest. Inh.* 99, ante, p. 118)

that the aggregate and individual shares of the preceding distribution be multiplied by an eighth of the aggregate of the shares of the fourth distribution ; but the eighth of the aggregate in this case, being only one, multiplication is of course needless, and the 384 shares, which were the property of the son at his death, must be divided between his widow, and his son, the former getting an eighth, or forty-eight shares, and the remaining 336 shares devolving on his son. This last result is obtained by multiplying the share of the son, and widow (seven and one) by forty-eight, or an eighth of the number of 384, to which the son of the original proprietor was entitled.

At the fifth distribution, on the death of the grandson, his 336 shares should have gone to his mother. The widow of the son would thus have had 384 ; but the surviving daughter of the original proprietor inherited from her father, sister, and mother 192 shares.

At the final distribution, therefore, the property should be made into 576 parts, of which two-thirds, or 384, should belong to the widow of the son, and one-third, or 192, to the daughter of the original proprietor, *Macn. Prec.* p. 159, *note*.

Case of a Brother and Sister with Widow's Mother and Brother, the Widow having died before the Distribution.—Where a person has left a widow, a brother, a sister, his widow's mother, and his widow's brother, and the widow died before the distribution, all the persons enumerated are entitled to share the inheritance, which should be made into twelve shares ; the brother of the deceased will take six, his sister three, his widow's mother one, and his widow's brother two, *Macn. Prec. Cas.* lxxxvi. p. 161.

The property in the first place, must be made into four shares, the claimants being, on the death of the proprietor, his widow, and his brother and sister. This is the least number out of which the widow could get her share (one-fourth) ; she will receive one, the brother two, and the sister one. On the death of the widow, her property will be made into three shares, the least number out of which the widow's mother could get her share (one-third). But, according to the rule

in cases of vested inheritance, her share (one) will be compared with the number of the division (three), and being found to be prime, or divisible by an unit only (see *Prin. Vested Inh.* 98, *ante*, p. 117), the aggregate, and individual shares of the first class will be multiplied by the aggregate of the shares of the second, thus: $4 \times 3 = 12$, and $1 \times 3 = 3$, and $2 \times 3 = 6$. After which the shares of the present class should be multiplied by the number to which the widow was entitled at the former distribution; but that number being only one, the multiplication is needless. Thus of the whole number twelve, the brother of the original proprietor will get six, his sister three, his widow's mother one, and his widow's brother two, *Macn. Prec.* p. 161, *note*.

The case of a Son, four Daughters, a Widow, and Three Sons of another Son, who dies before the Distribution.—Where a person has left two sons and four daughters by two different wives, one of whom survives him, after the death of the proprietor one of his sons, by his first wife died, leaving three sons. The surviving son of the original proprietor, with the four sisters, who are by the same mother, and father, and the three sons of his late half-brother, and his own mother, being nine in number, are the surviving claimants to the estate. The property of the deceased ancestor will be divided into 192 shares, agreeably to the law of vested inheritance, of which twenty-four shares will go to his surviving widow, forty-two to his son, who is still living, twenty-one to each of his four daughters, and fourteen to each of his three grandsons, being the sons of his son who died subsequently to his death, and previously to the distribution, *Macn. Prin.* p. 162, *Cas.* lxxxvii.

In this case of vested inheritance the property should agreeably to the third *Prin. of Dist.* (77, *ante*, p. 68) have been made into sixty-four parts, to satisfy all the claimants who were entitled to share on the death of the ancestor. As in the first instance, it should have been made into eight parts (the widow's share being an eighth), and as when the widow received her share, there remained only seven to be divided amongst the remaining eight claimants (one male counting as two females), then, on the death of one of the sons, his

sixteen shares being compared with the number of his heirs, or three, and proving prime, the number of the original division should be multiplied by the whole number of the second set of heirs. Thus: $64 \times 3 = 192$, see *Prin. Vest. Inh.* 98, *ante*, p. 117; *Macn. Prec.* p. 162, *note*.

Case of two Sons, a Daughter, and the Widow of another Son, who died before the Distribution.—The proprietor of property inherited from his ancestor, died, leaving three sons and a daughter. One of the sons died before any division of the property. He left a widow besides the two brothers, and sister. The whole of the property left by the ancestor must be made into seventy portions, out of which each of the sons will be entitled to twenty-six, the daughter to thirteen, and the deceased son's widow to five shares, *Macn. Prec.* p. 162, *Cas.* lxxxviii.

To arrive at this result, it must first be ascertained to what proportions the three sons, and the daughter would have been entitled had the inheritance been distributed on the death of the ancestor; and as a male is entitled to double the share of a female, it follows that the property to be distributed without leaving a fraction, must be made into seven parts, of which the deceased brother's portion would have been two shares. When he dies his share is to be distributed among his two brothers, his sister, and his widow. But the widow's share legally, where there are no children, is one-fourth, and therefore the smallest number of portions into which the deceased's two shares can be made, is four. Now, after the widow's share has been taken away, there will only remain three to be divided among five (the sharers are called five, though in reality only three, one male counting as two females), and the distribution obviously cannot take place without a fraction; in which case the rule is, to search for the proportion between the sharers, and the shares, which is found to be *mootubayun*, or prime, or divisible by an unit only (which gives the *Third Prin. of Distribution*, 77, *ante*, p. 68. Thus: $4 = 5 - 1$. The rule in the third principle is, that the number of shares be multiplied into the root of the case, thus: $4 \times 5 = 20$, which result, were it not a case of vested inheritance, would furnish the number from which the

several shares were to be extracted; but this being the case, the proportion between that result, and the number of the deceased's former shares, must be ascertained, which will be found to be concordant. Thus, $2 \times 10 = 20$, in which case the rule (see *Prin. Vest. Inh.* 99, *ante*, p. 118) is that the aggregate, and individual shares of the preceding distribution be multiplied by the measure of the number of shares into which it is necessary to make the estate at the second distribution. Thus, $7 \times 10 = 70$, &c., *Macn. Prec.* p. 163, *note*.

Case of a Husband and Son, the Husband dying before the Distribution, and leaving a Widow, another Son, and four Daughters.—Where one died, leaving an only daughter A, who subsequently died, leaving a son B, and husband C, her surviving. The husband then dies, leaving as his heirs a widow D, the said son B, by his former wife, another son E, by the wife who survived him, and four daughters, E, G, H, I, also by the surviving wife. The estate not having been distributed during his lifetime, the property will be made into 256 parts, of which 206 shares will go to the son of the first wife, fourteen to the son of the wife who survived her husband, eight to the widow, and the remaining twenty-eight to the four daughters, or seven shares to each. *Macn. Prec.* Cas. lxxxix. p. 163.

In this case of vested inheritance the subjoined table may tend to illustrate the order of succession :—

Propositus.

Λ.

$4 \times 64 = 256.$

C. $1 \times 64 = 64.$

B. $3 \times 64 = 192.$

C. $1 \times 64 = 64.$

I	H	G	F	E	D	B
7	7	7	7	14	8	$14 = 64$

At the distribution which should have taken place on the death of A, the property must have been made into, at least, four parts, to give her husband one-fourth. Then at the distribution which should have taken place on his death, the property belonging to him should have been made into, at least, eight parts, to give his wife one-eighth; but when she has taken her eighth, as the remaining heirs cannot get their portions without a fraction, and as, on a comparison of the

number of them, with that of the shares reserved for them, it gives a prime result, the number of the original division (see third *Prin. of Dist.* 77, *ante*, p. 68) must be multiplied by the number of such heirs, which is eight, one male counting for two females, thus: $8 \times 8 = 64$. Then, according to the law of vested inheritance, the number to which the deceased was entitled at the first distribution, being compared with the number into which it is necessary to make the second, and being found to be prime, the rule is (see *Prin. Vest. Inh.* 98, *ante*, p. 117) that the aggregate, and individual numbers of the first division be multiplied by the whole of the second, according to which process the son by the first wife will get 206 shares, 192 at the first, and fourteen at the second distribution, *Macn. Prec.* p. 164, *note*.

Case of a Widow, three Sisters, and a Paternal Uncle's Son, two of the Sisters dying prior to the Distribution, each leaving a Daughter.—A, died, leaving a widow B, three sisters C, D, and E, and F, the son of his paternal uncle. Subsequently to his death one of his sisters, D, died, leaving a daughter G, during the lifetime of the persons above-named; afterwards E, died, leaving a daughter H. After A's funeral expenses are paid, satisfaction of his debts, and legacies out of a third of what remains, the residue of A's property, according to the law of vested inheritance, will be made into thirty-six parts, of which nine shares will go to B, fifteen to C, three to F, four to G, and the remaining five to H, *Macn. Prec.* p. 164, *Cas. xc*.

In the first instance, the property should have been made into twelve parts, the portion of the widow being one-fourth, and of the sisters two-thirds, and in this case the rule being that the division be made by twelve (see *Prin. Inh.* 14, 24, *ante*, p. 33, and 65, *ante*, p. 58). But eight, which is two-thirds of twelve, cannot be distributed amongst the three sisters without a fraction, and three is prime to eight. Consequently, in conformity to the third *Prin. of Distribution* (77, *ante*, p. 68), the number of the original division should be multiplied by the number of sharers who cannot get their portions without a fraction. Thus: $12 \times 3 = 36$, which must be distributed in the following manner:—

B	C	D	E	F
9.	8.	8.	8.	3.

On the death of D, the number to which she was entitled at the former distribution (eight), and the number into which it is necessary to make her estate (four), being *mootudakhil*, or concordant, no further process is necessary, and her eight shares will be distributed thus :—

C	E	G	•
2.	2.	4.	

So also on the death of E, by the same rule, of her ten shares her daughter H, will get one moiety, and her sister C, the other, *Macn. Prec.* p. 165, *note*.

SECTION II.

OF DISTRIBUTION OF ASSETS.

Of claims and assets—Rules for apportioning them—When the numbers are prime—When the numbers are composite—Of individual heirs—Of creditors.

Of Claims and Assets.—Our preceding remarks have been directed to the ascertainment of the shares to which the several heirs are entitled. But when the proper number of shares into which an estate should be made, has been ascertained, it seldom happens that the assets of the estate exactly tally with such number; in other words, if it be found that the estate should be made into ten, or into fifty shares, it would seldom happen that the assets exactly amount in value to ten, or fifty gold mohurs, or rupees. To ascertain the proper shares of the different sets of heirs, and creditors in such cases, the following rules are laid down (*Macn. Prin.* 107):—

Rules for Apportioning them.—When the number of shares has been found, into which the estate should be divided, and the number of shares to which each set of heirs is entitled, the former number must be compared with the number of the assets. If these numbers appear to be prime

to each other, the rule is, that the share of each set of heir must be multiplied into the number of the assets, and the result divided by the number of shares into which it was found necessary to make the estate.

When the Numbers are Prime.—For instance, a man dies, leaving a widow, two daughters, and a paternal uncle, and property to the amount of twenty-five rupees. In this case the estate should be originally divided into twenty-four, of which the widow is entitled to three, the daughters to sixteen, and the uncle to five. Now, to ascertain what shares of the estate left, these heirs are entitled to, the above rule must be observed. Thus: $3 \times 25 = 75$, and $16 \times 25 = 400$, and $5 \times 25 = 125$; but $75 \div 24 = 3\frac{3}{4}$, and $400 \div 24 = 16\frac{1}{2}$, and $125 \div 24 = 5\frac{5}{4}$, *Macn. Prec.* 108.

When the Numbers are Composite, the rule is, that the share of each set of heirs must be multiplied into the measure of the number of the assets, and the result divided by the measure of the number of shares, into which it was found necessary to make the estate. For instance, a man dies, leaving the same number of heirs as above, and property to the amount of fifty rupees. Now, as twenty-four, and fifty agree in two, the measure of both numbers is half. Thus: $3 \times 25 = 75$, and $16 \times 25 = 400$, and $5 \times 25 = 125$; but $75 \div 12 = 6\frac{3}{2}$, and $400 \div 12 = 33\frac{4}{2}$, and $125 \div 12 = 10\frac{5}{2}$, *Macn. Prin.* 109.

And of Individual Heirs.—If it be desired to ascertain the number of shares of the assets, to which each individual heir is entitled, the same process must be resorted to, with this difference, that the number of the assets must be compared with the share originally allotted to each individual heir, and the multiplication, and division proceeded on as above. For instance, in the above case, the original share of each daughter was eight, and $8 \times 25 = 200$, and $200 \div 12 = 16\frac{8}{2}$, *Macn. Prin.* 110.

And of Creditors.—In the distribution of assets amongst creditors, the rule is, that the aggregate sum of their debts must be the number into which it is necessary to make the estate, and the sum of each creditor's claim must be considered as his share. For instance, supposing the debt of

one creditor to amount to sixteen rupees, of another to five, and of another to three, and the debtor to have left property to the amount of twenty-one rupees. By observing the same process as that laid down in *Prin.* 109, *ante*, p. 144, it will be found that the creditor to whom the debt of sixteen rupees is due, is entitled to fourteen rupees, the creditor to whom five rupees are due, to four rupees six annas, and the creditor to whom three rupees are due, to two rupees ten annas, *Macn. Prin.* 111, *ante*.

SECTION III.

PARTITION.

Property, where conveniently partible, should be distributed amongst the heirs at the desire of one or more—In other cases the consent of all is necessary—Mode of distribution—Of partition by usufruct—Gift of share before partition.

Property where conveniently Partible, should be Distributed among the Heirs at the desire of One or more.—Where two persons claim partition of an estate which has devolved on them by inheritance, it should be granted; and so also, where one heir claims it, provided the property admit of separation without detriment to its utility, *Macn. Prin.* 112.

In other Cases the Consent of all is Necessary.—But where the property cannot be separated without detriment to its several parts, the consent of all the co-heirs is requisite; so also, where the estate consists of articles of different species, *Macn. Prin.* 113.

Mode of Distribution.—On the occasion of a partition, the property (where it does not consist of money) should be distributed into several distinct shares, corresponding with the portions of the co-heirs; each should be appraised, and then recourse should be had to drawing of lots, *Macn. Prin.* 114.

Of Partition by Usufruct—another common Method of Partition.—Another common method of partition is by usufruct, where each heir enjoys the use, or profits of the

property by rotation ; but this method is subordinate to actual partition, and where one co-heir demands separation, and the other, a division of the usufruct only, the former claim is entitled to preference in all practicable cases, *Macn. Prin.* 115.

Gift of Share before Partition.—One of two sharers can give over his share to the other even before partition, *Musst. Aameena Bibee*, 3 *W. R. Civ. Rul.* 37. *Cal.*

SECTION IV.

INHERITANCE.

Inheritance according to the Imameeya, or Sheea doctrine.

Imam is a head or chief, in religious matters, whether he be the head of all Mahommedans, as the Khalif, or the priest of a mosque, or the leader in the prayers of a congregation. The Sheeas recognize twelve Imams, or heads of the faith in Ali, or his successors, of whom the last Imam, Mahdi, is believed to be still alive, *Morley, Introduction*, ccxxxvi. The Sheea sect is called *Imameeya*, from its recognizing the twelve Imams. The word Sheea, which signifies sectaries, or adherents, in general, was used to designate the followers of Ali as early as the fourth century of Hijrah (Reland, *de Reliq. Moham.*, p. 37). Macnaghten ("Preliminary Remarks," p. xii.), speaking of the intricacy of the rules, agreeably to which distributions are made, says : "It must at the same time be admitted that the heterodox code, or that which is observed by the Sheeas (commonly called the Imameeya sect, as they follow the doctrines of the twelve Imams), can boast of much greater simplicity. This code has hitherto had no weight in India, and even at Lucknow, the seat of heterodox majesty itself, the tenets of the Soonees are adhered to. I have, however, given a compendium of their law of inheritance, extracted from the *Shuraya-ool-Islam*, a work of the highest authority amongst them. This I was induced to do,

as no account has ever been rendered, to my knowledge, of the doctrine of the sect in question on the law of inheritance, and as I have reason to believe that our Courts of justice have passed decisions avowedly in conformity to its principles. Considering the universal toleration that prevails throughout the British dominions in India, it is perhaps but equitable that the law should be administered to the sectaries in question agreeably to their own notions of jurisprudence, especially in matters affecting the succession to property, in which cases both parties are of course always of the same persuasion."

Mr. Morley, Vol. I. p. 339, tit. *Inheritance*, note 3, says, that the general law of the country is that of Aboo Haneefah, and no other is administered in the Supreme Courts in cases of Mahommedan inheritance. The Iameeya code is now administered by the Honorable Company's Courts, where both parties are Sheeas. In his "Introduction," page clxxix., note (1), he corrects this error, referring to Baillie's *Mahommedan Inheritance*, Pref. p. vi., who says, that no other than the Soonee law is administered between Mahommedan parties in the Supreme Courts of India. *Mr. Morley (ib.)* adds, it may be true that no case may have as yet occurred in those Courts in which the parties held other than the Soonee doctrine; but there can be little doubt that, in the event of a case between Mahommedans, not being Soonees, the law administered would be according to the religious persuasion of the litigants. In a case decided in the Supreme Court in Bombay, where the parties held particular tenets scarcely compatible with the Mahommedan law, Sir E. Perry, C.J., in delivering judgment, remarked: "I am clearly, therefore, of opinion, that the effect of this clause in the charter is not to adopt the text of the Koran as law, any further than it has been adopted in the laws and usages of the Mahommedans who came under our sway; and if any class of Mahommedan dissenters, as they may be called, are found to be in possession of any usage, which is otherwise valid as a legal custom, and which does not conflict with any express law of the English Government, they are just as much entitled to the protection of this clause, as the most orthodox Soonee who can come before the Court," *Perry's Oriental Cases*, p. 124.

There can be no doubt of the correctness of these observations, when we bear in mind that the charters of justice for India require that the law of the defendant shall be permitted to govern the case.

The Judicial Committee of the Privy Council affirmed a decision of the *S. D. A.*, which declared that, by the law governing the Sheea sect, the brother is entirely excluded by a daughter. 24 Feb., 1841, *Rajah Deedar Hossein v. Ranee Zunoor-oon-Nissa*, 2 *Moore's Ir. Ap.* 441; 30 Dec., 1808, 1 *S. D. A. Beng.* 268; 12 Aug., 1822, 3 *S. D. A.* 164; see 5 *S. D. A.* 29; *post*.

Three widows, three daughters, a mother, and a brother were claimants of a Mussulman's property. The property should be divided into seventy-two, or two hundred and sixteen parts, of which the widows should get nine, or twenty-seven, the daughters forty-eight, or one hundred and forty-four, the mother twelve, or thirty-six, and the brother three, or nine; and one of the daughters dying before the distribution, her mother takes one-sixth of her share, or eight, two-thirds of thirty-two are equally divided between her sisters, who get sixteen each, and the residue goes to the father's brother, her uncle. Hence the division will be: mother, $\frac{36}{216}$; first wife, $\frac{17}{216}$; second and third wives, $\frac{9}{216}$; two surviving daughters, each $\frac{64}{216}$; and brother, $\frac{17}{216}$. 4 Aug., 1820, 3 *S. D. A. Beng.* 46.

This case was decided according to the Soonee doctrine, but in a later case between the same parties, in which the uncle claimed his brother's share of a *Zamindari*, it was settled that the parties being of the Sheea sect, the law must be taken as received by that sect, and the brother (the uncle) was consequently held to be excluded by co-existing daughters; but what would be the legal distribution of his brother's estate was not settled. 12 Aug., 1822, 3 *S. D. A.* 164; *supra*.

In another case between the same parties, it was held that though, in the distribution of heritage, both the Soonee and Sheea sects recognize the same *furaiz*, or specific shares, they differ as to the distribution of the *radd*, or residue, should there be any. The Sheeas prefer the nearest kin, who

divide it in proportion to their specific shares ; the Soonees, on the contrary, give preference to the *asbah*, or agnate kinsman. 18 May, 1830, 5 *S. D. A. Beng.* 29 ; 24 Feb., 1841, 2 *Moore's In. Ap.* 441 ; *supra*.

Of the Right of a Brother according to the Soonee, and the Sheea Sects.—In the event of a deed of dower set up by a widow proving invalid, will her adversary, who is a brother of her husband, succeed to the property left by him ? According to the tenets of the Soonee sect, the brother of the deceased will be entitled to a share of the property, by right of inheritance, as residuary, after the legal sharers shall have been satisfied. (Two tables were subjoined, exhibiting the mode of distribution according to the respective allegations of each party.*) According to the tenets of the Sheea sect, the brother has no right of inheritance where there is a daughter. The widow and her daughter will succeed jointly, *Macn. Prec.* p. 108, Cas. xxix.

Principles of Succession.—According to the tenets of this school, there are three principles which regulate succession,—

1. Marriage.

2. Consanguinity.

3. Wula.—*Elb.* 64 ; *Macn. Prin.* ch. ii. *Prin.* 2.

1. Heirs by Marriage.—The heirs by marriage are the husband and wife, who can never be excluded, for they take their shares, as with the Soonees, in all cases, *Elb.* 64.

Their shares are—half for the husband, and a fourth for the wife, if there are no children, and a fourth for the husband and an eighth for the wife, if there are children, *Macn.* ch. ii. *Prin.* 20.

Of the Succession of Husband and Wife.—On failure of heirs by blood, the husband takes the whole estate of his wife ; but where the husband dies, leaving no other heir but his wife, she is only entitled to her legal share, or one-fourth of the property, the residue escheating to the ruling power, *Elb.* 64 ; *Macn.* ch. ii. *Prin.* 21.

* By the table delivered in by the widow the husband's brother would be entitled to thirty-eight out of 216 shares, or between a fifth and a sixth of the estate ; by that delivered in by the brother he was declared entitled to 146 out of 648, or between a fourth and a fifth of the estate.

Where Marriage not Consummated.—If a sick man marry and afterwards die of that sickness without having consummated the marriage, his wife shall not inherit his estate, nor shall he under such circumstances inherit his wife's estate if she die before him; but if a sick woman marry, and her husband die before her, she shall inherit of him, though the marriage was never consummated, and though she never recovered from that sickness, *Macn. ch. ii. Prin. 22.*

In Case of Divorce on Death-bed.—If a man on his death-bed divorce his wife, she shall inherit, provided he died of that sickness within one year from the period of divorce, but not if he lived for upwards of a year, *ib. Prin. 22.*

Or of Reversible Divorce.—In case of a reversible divorce, if the husband die within the period of the wife's probation, or if she die within that period, they have a mutual right to inherit each other's property, *Macn. ib. 23.*

Or of Irregular Marriage.—The wife by usufructuary or temporary marriage has no title to inherit, *ib. Prin. 24.* This seems to be a contradiction in terms, for there can be no temporary marriage—unless Macnaghten refers to the case of a slave, who under certain circumstances might be emancipated conditionally. See *Macn. ch. ix. p. 65, "Of Slavery."*

2. Heirs by Consanguinity.—*Elberling, 64,* says, the heirs by blood may be divided into four classes.

Macnaghten says: There are three degrees of heirs who succeed by virtue of consanguinity, and so long as there is one of the first degree, even though a female, none of the second degree can inherit; and so long as there is any one of the second degree, none of the third can inherit, *Macn. ch. ii. Prin. 3.*

Heirs of the First Degree or Class.—These consist of two divisions: first, parents, second, the children and grandchildren, how low in descent soever, the nearer excluding the more distant, *Elb. 64; Macn. ch. ii. Prin. 4.*

Their Relative Rights.—Both parents, or one of them, inherit together with a child, a grandchild, or a great-grandchild; but a grandchild does not inherit together with a child, nor a great-grandchild together with a grandchild, *Macn. ch. ii. Prin. 4; Elb. 64.*

Subdivision of.—This degree also comprises two divisions—the roots, which are limited, and the branches, which are unlimited, *Macn.* ch. ii. *Prin.* 5. The former are the parents, who are not represented by their parents, or, as Elberling (64) puts it, the grandparents, the great-grandparents, and the other ancestors, how high soever. The latter are the children, who are represented by their children. An individual of the one class does not exclude an individual of the other, though his relation to the deceased be more proximate, but the individuals of either class exclude each other in proportion to their proximity.

Of Claimants with Children.—No claimant has a title to inherit with children, but the parents, or the husband and wife, *Macn.* ch. ii. *Prin.* 6.

Of the Offspring of Sons and Daughters.—The children of sons take the portions of sons, and those of daughters take the portions of daughters, how low soever in descent, *Macn.* ch. ii. *Prin.* 7.

Of the Second Degree.—The second degree comprises the grandfather, and grandmother, and other ancestors, and brothers, and sisters, and their descendants, how low soever, the nearer of whom exclude the more distant, *Macn.* ch. ii. *Prin.* 8. The great-grandfather cannot inherit with a grandfather, or a grandmother, and the son of a brother cannot inherit with a brother, or a sister, and the grandson of a brother cannot inherit with the son of a brother, or with the son of a sister, *Macn.* ch. ii. *Prin.* 8.

This degree is again divided into two classes—the grandparents and other ancestors and the brethren and their descendants. Both these classes are unlimited, and their representatives in the ascending and descending line may be extended *ad infinitum*. An individual of the one class does not exclude an individual of the other, though his relation to the deceased be more proximate; but the individuals of either class exclude each other in proportion to their proximity, *Macn.* ch. ii. *Prin.* 9.

The Third Class or Degree.—The third class, or degree comprises the paternal, and maternal uncles, and aunts, and their descendants to the remotest degree, the nearer of whom

exclude the more distant. The son of a paternal uncle cannot inherit with a paternal uncle, or a paternal aunt, nor the son of a maternal uncle with a maternal uncle, or a maternal aunt, *Macn.* ch. ii. *Prin.* 10 ; *Elb.* 64.

Additional Rules. — This degree is unlimited in the ascending, and descending line, and their representatives may be extended *ad infinitum* ; but so long as there is a single aunt, or uncle of the whole blood, the descendants of such persons cannot inherit. Uncles, and aunts all share together, except some be of the half, and others of the whole blood. A paternal uncle by the same father only, is excluded by a paternal uncle by the same father, and mother ; and the son of a paternal uncle by the whole blood excludes a paternal uncle of the half-blood, *Macn.* ch. ii. *Prin.* 11.!

Other heirs of the Third Class or Degree.—In default of all the heirs above enumerated, the paternal, and maternal uncles and aunts of the father and mother succeed ; and in their default their descendants to the remotest generation, according to their degree of proximity to the deceased. In default of all these heirs, the paternal, and maternal uncles, and aunts of the grandparents and great-grandparents inherit according to their degree of proximity to the deceased, *Macn.* calls this the fourth class, or degree, ch. ii. *Prin.* 12 ; *Elb.* 64.

Rules of Succession.—Of these four classes he says each excludes the next lowest, but one division of the class does not exclude the other, *Elb.* 64 ; *Macn.* ch. ii. *Prin.* 11.

There is no distinction made, as in the Soonee school, with reference to the sex of the heirs, or of the persons from whom they claim, *Elb.* 64.

In each division, or in each class where there are no divisions, the nearer excludes the more remote, *Elb.* 64.

General Rule relative to the Whole and the Half-Blood.—Individuals of the whole blood exclude those of the half-blood in the same degree of relationship, or who are of the same rank. It therefore does not apply to individuals of different ranks ; for instance, a brother or sister of the whole blood excludes a brother or sister of the half-blood : a son of a brother of the whole blood, however, does not exclude a brother of the half-blood, because they belong to different

ranks, but he would exclude the son of a half-brother who is of the same rank; so also an uncle of the whole blood does not exclude a brother of the half-blood, though he does an uncle of the half-blood, *Macn. ch. ii. Prin. 13.*

The principle of the whole blood excluding the half-blood is confined also to the same rank among collaterals; for instance, generally a nephew or niece whose father was of the whole blood does not exclude his or her uncle or aunt of the half-blood, except in the case of there being a son of a paternal uncle of the whole blood, and a paternal uncle of the half-blood, by the same father only, the latter of whom is excluded by the former, *Macn. ch. ii. Prin. 14.*

Where the Sides of Relation Differ and where they are the Same.—This principle of exclusion does not extend to uncles and aunts being of different sides of relation to the deceased. For instance, a paternal uncle, or aunt of the whole blood does not exclude a maternal uncle or aunt of the half-blood; but a paternal uncle, or aunt of the whole blood excludes a paternal uncle or aunt of the half-blood; and so likewise a maternal uncle or aunt of the whole blood excludes a maternal uncle, or aunt of the half-blood, *Macn. ch. ii. Prin. 15.*

Additional Rule where the Sides differ.—If a man leave a paternal uncle of the half-blood, and a maternal uncle of the whole blood, the former will take two-thirds in virtue of his claiming through the father, and the latter one-third in virtue of his claiming through the mother, as the property would have been divided between the parents in that proportion, had they been the claimants instead of the uncle and aunt, *Macn. ch. ii. Prin. 16, p. 37.*

Further Exception relative to the Exclusion of Half-blood.—The general rule that those related by the same father and mother exclude those who are related by the same mother only, does not operate in the case of individuals to whom a legal share has been assigned, *Macn. ch. ii. Prin. 17.*

Of Uterine and Half-Brothers.—If a man leave a whole sister and a sister by the same mother only, the former will take half the estate, and the latter one-sixth, the remaining reverting to the whole sister; and if there be more than one

sister by the same mother only, they will take one-third, and the remaining two-thirds will go to the whole sister, *Macn. ch. ii. Prin. 18.*

Rule in case of a Double Relation.—Where there are two heirs, one of whom stands in a double relation; for instance, if a man die leaving a maternal uncle and a paternal uncle who is also his maternal uncle, the former will take one-third and the latter two-thirds, and he will be further entitled to take one-half of the third which devolved on the maternal uncle; and thus he will succeed altogether to five-sixths, leaving the other, but one-sixth, *Macn. ch. ii. Prin. 19.*

The relation of paternal and maternal uncle may exist in the same person in the following manner: A having a son, C, by another wife, marries B, having a daughter, D, by another husband; then C and D intermarry, and have issue a son, E, and A and B have a son, F. Thus F is both the paternal and maternal uncle of E. So, likewise, if a person have a half-brother by the same father and a half-sister by the same mother, who intermarry, he will necessarily be the paternal and maternal uncle of their issue, *Macn. ch. ii. note.*

The Children of Relations of Same Degree but of different Sexes.—The children of relations who are of the same degree, but of different sexes, take *per stirpes*—*c.g.* the children of sons take the share of sons, and the children of daughters take the portion of daughters, *Elb. 64.*

Legal Sharers.—The legal sharers and the extent of the shares assignable to them are the same as among the Soonees, *Elb. 64.*

3. Heirs by Wula.—The third principle of succession, termed Wula, is applicable to the legal relationship subsisting between an emancipator and his freed man, or between two persons who mutually engage to be heir to each other, *Macn. ch. ii. Prin. 27.*

Claimants under this latter title are excluded by those under the former, *Macn. ch. ii. Prin. 28.* But the relationship between the emancipator and his freed man no longer exists, slavery having been abolished.

This class can never inherit so long as there is any claimant by consanguinity or marriage, *Macn. ch. ii. Prin. 26.*

General Rules of Exclusion.—The general rules of exclusion according to this sect, are similar to those contained in the orthodox doctrine, except that they make no distinction between male and female relations. Thus, a daughter excludes a son's son, and a maternal uncle excludes a paternal granduncle; whereas, according to the orthodox doctrine in such cases, the daughter would only get half, and the maternal uncle would be wholly excluded by the paternal uncle of the father, *Macn. ch. ii. Prin. 29.*

Homicide, unless Wilful, does not exclude.—Homicide, whether justifiable or accidental, does not operate to exclude from the inheritance. The homicide to disqualify must have been of *malice prepense*, *Macn. ch. ii. Prin. 30, ante.*

The Return.—The principle of the return is generally the same as with the Soonees. Where the assets exceed the number of heirs, the surplus reverts to the heirs. The husband is entitled to share in the return, but not the wife, nor is the mother, if there be brethren; and where there is any individual possessing a double relation, the surplus reverts exclusively to such individual, *Macn. ch. ii. Prin. 32.*

The Increase.—The legal number of shares into which it is necessary to make the property cannot be increased if found insufficient to satisfy all the heirs without a fraction. In such case, a proportionate deduction will be made from the portion of such heir as may, under certain circumstances, be deprived of a legal share, or from any heir whose share admits of diminution. For instance, in the case of a husband, a daughter, and parents—here the property must be divided into twelve, of which the husband is entitled to three, or one-fourth, the parents to two-sixths, or four, and the daughter to half; but there remain only five shares for her instead of six, or the moiety to which she is entitled. In this case, according to the orthodox doctrine, the property would have been made into thirteen parts, to give the daughter her six shares; but according to the Imameeya tenets, the daughter must be content with the five shares that remain, because in certain cases her right

as a legal sharer, is liable to extinction: for instance, had there been a son, the daughter would not have been entitled to any specific share, and she would become a residuary; whereas the husband or parents can never be deprived of a legal share under any circumstances, *Macn.* ch. ii. *Prin.* 31; *Elb.* 65.

Primogeniture.—The right of primogeniture is allowed to a limited extent. The eldest son inherits, if he is worthy, the father's sword, Koran, wearing apparel, and ring, *Macn.* ch. ii. *Prin.* 33.

These are the prominent distinctions of the Sheea school. In most other respects its doctrines agree with the Soonees. The legal shares allotted to the several heirs are the same as those prescribed in the Soonee code, both having the precepts of the Koran as their guide. The rules of distribution, and of ascertaining the relative shares of the different claimants, are also, *mutatis mutandis*, the same, *Macn. ib. note.*

When the Amount of Dower specified at the Marriage differs from that specified in the Deed.—Where, on a marriage between parties of the Sheea sect, the sum of 500 rupees was verbally specified as the amount of dower at the reading of the ceremony in the Sheea form, but the deed of settlement was executed by the husband for a much larger sum, it was held that the sum specified in the deed was the sum demandable, *Omanton Nissa Begum v. Mirza Asud Ali*, 1 *S. D. A.* 276; *Muss. Rahut Oonissa v. Mirza Hizum Beg.* 2 *ib.* 198.

Agreeably to the doctrine of both sects, it is optional with the parties contracting a marriage to fix the amount of dower, either before, or after reading the marriage ceremony, 2 *S. D. A. Ben. Rep.* 198.

One of the Sheea sect, by deed of dower, charged his whole estate with a certain sum, when demanded by his wedded wife, but did not impignorate his estate to secure the sum put in settlement. The dower was not demanded during the lifetime of the husband, and his widow, at his death, took possession of his estate in satisfaction of her claim. The Judicial Committee held, affirming the judgment of the Court below, that the widow had a lien upon her deceased husband's estate, as being hypothecated for her dower, and could either

retain property to the amount of her dower, or alienate part of the estate in satisfaction of her claim, *Ameen-oon-Nissa v. Moorad-oon-Nissa*, 6 *Moore's In. Ap.* 211.

A demand during the lifetime of the husband is not necessary, and although more than twelve years had elapsed from the date of the deed, and the time the widow set up her claim for dower, she was not affected by the provisions of the Bengal Regulations, III. of 1793, Sec. xiv., and the limitations there provided for, formed no bar to her dower, *ib.*

In a suit by the only brother, and heir-at-law of a Mahomedan of the Sheea sect, claiming the whole of the deceased's estate, and for mesne profits, the issues raised were, whether a marriage had taken place between the deceased and the party in possession, who claimed to be his widow; and, secondly, the validity of a deed of dower executed by the deceased in her favour. These issues being found for the widow, the Court dismissed the suit. Held by the Judicial Committee, affirming the finding of the Court below, that although the estate of the husband was hypothecated for the dower, yet, as the heir-at-law would be entitled to the residue, after satisfying the widow's claim, he was by right entitled to an account; but as the plaintiff did not admit of an account being taken, the appeal was affirmed, without prejudice to a suit being brought for administration of the deceased's estate upon the footing of the marriage and deed of dower by the deceased being admitted in the suit, 6 *Moore's In. Ap.* 211, *supra*.

BOOK II.

CONTRACTS.

CHAPTER I.

SEC. I.—OF SALE.

SEC. II.—OF DEBTS AND SECURITIES.

SECTION I.

OF SALE.

Definition of—Law of contract not binding upon Courts, still they will respect it—What constitutes sale—Who competent to sell—Minor—Lunatic—Diseased person—Four kinds of sale—When equality in quantity necessary—Four denominations of—Absolute sale—Conditional sale—An imperfect sale—A void sale—May be express or implied—Certainty of—Subject of sale—Boundaries—Of the consideration—Of the parties—Postponement of payment—Subject should be in existence—Illegal conditions—Deferment of payment—Sale of debt—Warranty implied—Where purchaser may recede—What passes on sale of land—Sale by and to an heir—Death-bed sale—Rescission of contract—Resale—Where there is an option of dissolving the contract—Option to purchasers of unseen property—No option to sellers—Discovery of defects—Where there has been a resale—Where restitution may be demanded—First purchaser on footing with second—How remedy against seller lost—When the articles will not admit of separation—Illegal practices—Informality in deed—Right of pre-emption cannot invalidate sale.

Definition of.—Sale is defined to be a mutual and voluntary exchange of property for property, *Macn. ch. iii. § 1.*

Sale, as the term is used in Mahommedan law, includes

barter, and also loan, where the articles lent are intended to be consumed, and replaced to the lender by a similar quantity of the same kind, *Bail. Mahom. Law of Sale, Intro.*, p. xii.

The validity of a sale is derived, not from the seisin, but from the contract, 1 *Fulton*, 152, *Sup. Ct. Cal.*

Law of Contract not binding on Courts, yet they will respect it.—The Mahommedan law of contract is not binding on the Courts (not established by Royal Charter) Clause 1st, Sec. xvi., Reg. III., of 1802; still, where equity may not be imperilled, the Courts would respect this branch also of the law, *Stra. Man. H. L.* 73.

What constitutes a Sale.—Tender and acceptance constitute a complete sale, *Macn. Prec.* 168.

Who competent to Sell.—The parties to all contracts, including sale, must have a sense of the obligation of the contract into which they enter, *Macn. ch. iii. § 11.*

Minor.—A minor cannot contract without consent of his guardian.

Lunatic.—Nor can a lunatic unless during lucid intervals, *Macn. ch. iii. § 11.*

Disease.—Nor can a person contract to sell who is affected with mortal disease, *Macn. Prec.* 179.

Four Kinds of Sale.—Sales are of four kinds, viz.,—1st, exchange of goods for goods; 2ndly, money for money; 3rdly, goods for money; 4thly, money for goods, *Macn. ch. iii. § 3.*

*This last is the most ordinary species of this kind of contract, *ib.*

When Equality in Quantity necessary.—Where the articles to be exchanged are similar in their nature, such as money for money, equality in point of quantity is an essential condition, *Macn. ch. iii. § 15.*

Four Denominations of.—Sales are either absolute, or conditional, or imperfect, or void, *Macn. ch. iii. § 4.*

1. Absolute Sale.—An absolute sale is that which takes effect immediately, there being no legal impediment, *ib. § 5.*

2. Conditional Sale.—A conditional sale is that which is suspended on the consent of the proprietor, or (where he is

a minor) on the consent of his guardian, in which there is no legal impediment and no condition requisite to its completion but such consent, *Macn.* ch. iii. § 6.

A conditional sale is good and valid, though a conditional gift is void, *Macn. Prec.* 176.

3. An imperfect Sale is that which takes effect on seisin, the legal defect being cured by such seisin, *Macn.* ch. iii. § 7.

4. A void Sale.—A void sale is that which can never take effect, in which the articles opposed to each other, or one of them, not bearing any legal value, the contract is nude, *ib.* § 8.

May be express or implied.—A sale may be express, *i.e.* by the agreement of the parties, or implied, as in the case of reciprocal delivery, *Macn. ib.* § 2.

Certainty of Subject of Sale.—It is essential that the subject of the sale, and the consideration should be so certain and determinate as to admit of no future contention as to the meaning of the parties, *Macn.* ch. iii. § 13.

Boundaries.—The non-specification of the boundaries of an estate does not invalidate its sale, *Macn. Prec.* 166.

And it is necessary that the subject of the contract should either be in actual existence at the time of sale, or capable of delivery at some future definite time, *Macn.* ch. iii. § 13.

Of the Consideration.—The consideration may consist of whatever articles, bearing a legal value, the seller and purchaser may agree upon, and the property may be sold for prime cost, or for more or for less than prime cost, *Macn.* ch. iii. § 9.

Of the Parties.—It is necessary that there should be two parties to every contract of sale, except where the seller and purchaser employ the same agent, or where a father, or a guardian makes a sale on behalf of a minor, or where he purchases his own freedom by permission of his master, *ib.* § 10.

Postponement of Delivery.—In a commutation of goods for goods, or of money for money, it is illegal to stipulate for a future period of delivery. But in a commutation of money

for goods, or of goods for money, such stipulation is legal, *Macn.*, Ch. iii., § 12.

Subject should be in Existence.—The subject of the contract should be in actual existence at the time of making the contract, and it should be susceptible of delivery, either immediately or at some future definite period, *Macn.*, Ch. iii., § 14.

Illegal Conditions.—It is unlawful to stipulate for any extraneous conditions involving an advantage to either party, or any uncertainty which might lead to future litigation; but if the extraneous condition be actually performed, or the uncertainty removed, the contract will hold good, *Macn.*, Ch. iii., § 16.

Deferment of Payment.—When payment is deferred to a future period it must be determinate, and cannot be suspended on an event, the time of the occurrence of which is uncertain, though inevitable. Thus it is not lawful to suspend payment until the wind shall blow, or until it shall rain; nor is it lawful, even though the uncertainty be so inconsiderable as almost to amount to a fixed term. Thus it is not lawful to suspend payment until the sowing, or reaping time,* *Macn.*, Ch. iii., § 18.

Sale of Debt.—It is not lawful to sell property in exchange for a debt due from a third person, though it is, for a debt due from the seller, *Macn.*, Ch. iii., § 19.

Warranty implied.—A warranty as to freedom from defect and blemish is implied in every contract of sale, *Macn.*, Ch. iii., § 21.

When Purchaser may recede.—Where property sold differs in quantity or quality from the description given by the seller, the purchaser may recede from the contract, *Macn.*, Ch. iii., § 22.

What passes on Sale of Land.—By the sale of land nothing thereon which is of a transitory nature passes. The fruit remaining at the time on the tree belongs to the seller, though the tree itself, being a fixture, becomes the property of the vendee, *Macn.*, Ch. iii., § 23.

* This last instance is a very common custom of the Madras Presidency. Note by Mr. Sloan to his Ed. of *Macn.*

Sale by and to an Heir.—The sale by one of several heirs of property in which all have a right to participate, is to be upheld only, to the extent of the alienor's share, *Macn. Prec.* 167.

A death-bed Sale to one heir is not valid unless assented to by the others, subsequently to his death, *Macn. Prec.* 177.

Rescission of Contract.—Either party may stipulate for an option of withdrawing from the contract within a period not exceeding three days, *Macn.*, Ch. iii., § 17. But the right is determined by the purchaser's exercising acts of ownership over the subject of sale, *Macn.*, Ch. iii., § 24.

Resale.—A purchaser cannot re-sell personal property purchased, until it has actually come into his possession, *Macn.*, Ch. iii., § 20.

Where there is an Option of dissolving the Contract, and the Property is injured or destroyed whilst in the possession of the purchaser, he is responsible for the price agreed upon ; but where the option was on the part of the seller, the purchaser is responsible for the value only of the property, Macn., Ch. iii., § 24.

Option to Purchasers of Unseen Property.—Where the property has not been seen by the purchaser, nor a sample (where a sample suffices), he may recede from the contract, provided he has not exercised any act of ownership, if upon seeing the property it does not suit his expectation, even though no option may have been stipulated, *Macn.*, Ch. iii., § 26.

No Option to Sellers.—But though the property has not been seen by the seller, he is at liberty to recede from the contract (except in a sale of goods for goods), where no option was stipulated, *Macn.*, Ch. iii., § 27.

Discovery of Defects.—A purchaser who may not have agreed to take the property with all its faults, is at liberty to return it to the seller, on the discovery of a defect of which he was not aware at the time of the purchase, unless whilst in the hands of the purchaser it received a further blemish, in which case he is only entitled to compensation, *ib.*, § 28.

Where there has been a Resale.—But if the purchaser

have sold such faulty article to a third person, he cannot exact compensation from the original seller, unless by having made an addition to the article prior to the sale he was precluded from returning it to the original seller, *Macn., ib.*, § 29.

Where Restitution may be demanded.—In a case where articles are sold and are found, on examination, to be faulty, complete restitution of the price may be demanded from the seller, even though they have been destroyed in the act of trial, if the purchaser had not derived any benefit from them; but if the purchaser had made beneficial use of the faulty articles, he is entitled to proportional compensation, *Macn.*, § 30.

First Purchaser on a Footing with Second.—If a person sell an article which he had purchased, and be compelled to receive back such article, and to refund the purchase money, he is entitled to the same remedy against the original seller, if the defect be of an inherent nature, *Macn., ib.*, § 31.

How Remedy against Seller lost.—If the purchaser, after discovering the defect, make use of the article, or attempt to remove the defect, he shall have no remedy against the seller (unless there may have been some special clause in the contract), such act on his part implying acquiescence, *Macn., ib.*, § 32.

When the Article will not admit of Separation.—It is a general rule, that when the articles sold will not easily admit of separation, or division without injury, and part of them subsequently to the purchase be discovered to be defective, or to be the property of a third person, it is not competent to the purchaser to keep a part, and to return a part, demanding a proportional restitution of the price for the part returned. In this case he must either keep the whole, demanding compensation for the proportion that is defective, or he must return the whole, demanding complete restitution of the price. It is otherwise where the several parts may be separated without injury, *Macn., ib.*, § 33.

Illegal Practices.—The practices of forestalling, regrating, and engrossing, and of selling on Friday, after the hour of

prayer, are all prohibited, though they are valid, *Macn., ib.,* § 34.

Informality in Deed does not vitiate a deed of sale, *Macn. Prec. Cas. viii.*

The Right of Pre-emption cannot be pleaded between the seller and the purchaser as a ground to invalidate a sale, *ib., post., Pre-emption.*

SECTION II.

OF DEBTS AND SECURITIES.

Responsibility of heirs — Debtor cannot prejudice his creditor by alienation on death-bed — Death-bed acknowledgment — Joint debtor — Joint sureties — Partners in trade — Bond by one of two undivided brothers — Discharge — Bill of exchange and promissory notes — Necessary debts on account of minors — Of attachment and sale — Debt must be satisfied by compromise or liquidation — Verbal and written engagements — Informality in deed — Priority of claims — Sale has preference over gift — Dissolution of contract — Interest — Mortgage — Essentials thereof — Prior right of mortgagee — Creditor cannot alienate mortgage — Use of pledge — Loss of pledge — Obligations of mortgagor or mortgagee — Priority of claim of mortgagee — No distinction exists except as regards pledge with respect to priority — Limitation rules.

Responsibility of Heirs.—Heirs are answerable for the debts of their ancestors, as far as there are assets, *Macn., Ch. xi., 1.*

By the Mahommedan law the heir of a deceased Mussulmann is liable to pay the debts of the deceased to the extent of the assets to which he may have succeeded, but he is not bound to pay the whole of the debts, 17 June, 1840; 1 Sev. Cases 57 *S. D. A. Cal.*

Debts which must be satisfied before legacies and claims of inheritance lie only against the estate of the deceased debtor, *ib.*

Heirs are answerable for the debts of their ancestors as far as there are assets, but no farther.

If the debtor left property at his death, the creditor may claim his debt from the heir of the deceased, who has become

possessed of the property left ; and the debts of a deceased person must be liquidated before claims of inheritance can be satisfied. If the amount of the property exceed the amount of the debts, the heirs will share the residue, but if the property fall short of the amount of the debts, the whole of it must be appropriated to their liquidation, and the heirs will not then be responsible for what remains due. If the deceased left no property, the claim of the creditors will not lie against his heirs. If, at the death of the debtor he leave a son, two brothers, and one brother's son, the former will be liable, and the residue after the creditors shall have been satisfied will devolve entirely upon him according to law ; the brother, and brother's son cannot inherit any of his property during his lifetime, *Macn. Prec.* p. 88, *Cas. viii.*, *Prin. Inh.* 21, *ante*, p. 32.

A debt is contracted by B, the mother of A. A entered into a written engagement to discharge it out of a pension granted to him by the Honorable Company, and mortgaged the pension as security. But he died before the debt became due, or any part of it was paid. The pension was continued to C, D, and E, the sons and widow of A ; it did not appear that they inherited any property from either A, or B. The Court with reference to the law officers held that as the Honorable Company granted the pension first to A, and afterwards to his widow and sons, it may have been chiefly his property during his life, but certainly was exclusively theirs after his death, and the property out of which the debt was to be paid, then ceased to form any part of his estate. C, D, and E were also held not to be responsible out of property acquired by themselves for a debt which they neither contracted, nor engaged to pay, and that the pension alone having been mortgaged for the debt, no property of A, possessed by him, or inherited from him by C, D, and E, could have been responsible for it during his life, or after his death, *Cas. 4, 1821, 1 Mad. Dec.* 280.

When the widow of a Mussulmann had not derived any property from her late husband, she was held not to be liable for his debts, 6th June, 1826 ; 4 *S. D. A. Ben. Rep.* 161.

Heirs are answerable for the debts of their ancestors to the

extent of the estate which they inherit. After liquidation of such debts, the personal judgment creditors of the heirs are entitled to satisfaction of their claims from the residue, as well as from the acquired property of the heirs, *Sheick Kasim Aly. Petr.* 5 July, 1851; Case 34, *Sev. Rep. S.D.A. Ben.* Vol. III. 141.

Debtor cannot prejudice Creditor by Alienation on Death-bed.—A debtor cannot on death-bed devise or otherwise alienate his property to the prejudice of his creditors, *Macn. Prec.* p. 346.

Death-bed Acknowledgments.—Debts acknowledged on death-bed must give precedence to those contracted in health, unless it be notorious that the former were bonâ fide contracted, *Macn.*, Ch. xi., § 2; and death-bed acknowledgment in favour of an heir is entirely null and void unless the other heirs admit that it was due, *Macn.*, Ch. xi., p. 72.

Joint Debtors.—If two persons jointly contract a debt, and one of them should die, the survivor will be responsible for a moiety only of the debt, unless there was an express stipulation that each should be liable for the whole amount; for the law presumes that both equally participated in the fruits of the loan, so that neither is legally liable for that, from which he derived no benefit, *Macn.*, Ch. xi., § 3, *ib.*, *Prec.* 1. 4.

Joint Sureties.—The same principle is applicable to the case of two persons becoming joint sureties for the payment of a debt, *ib.*, Ch. xi., § 4.

Partners in Trade.—But where two partners are engaged in traffic, who have contributed the same amount in capital, and who are equal in all respects, each is responsible for the acts done, and debts contracted by the other; but this rule does not extend to other partnerships, for there a creditor of the concern cannot claim the whole debt from any one of the partners, but must enforce his claim against the partners collectively, or if he proceed against one individually, he must confine his claim to the extent of his share, *ib.* § 5.

A Bond by one of Two Undivided Brothers.—A debt secured under a bond executed by one of two undivided

brothers must be discharged by himself alone, unless the other has in writing consented to share with him the obligation, *S.A. Decree in A. No. 23 of 1854*.

Discharge.—A debt secured under a bond can only be discharged by a written receipt, *S.A. Decree in A. No. 202 of 1859*.

Bills of Exchange—Promissory Notes.—A Bill of Exchange having been accepted, the drawer is absolved from responsibility to the holder, unless the acceptor dies insolvent previous to the money* being due, *S. U., Pro. 27th April, 1807*.

By the Mahommedan law, every Bill of Exchange imports a command to the drawee to pay, and his acceptance is not only an admission of effects, or money in his hands to pay, but also an undertaking by the acceptor, as well, with respect to the drawer, as the payee, to pay the bill, *Case 5 of 1805, 1 Mad. Dec. 1*.

The drawer of a Bill of Exchange, accepted by the drawee, can only become responsible for payment thereof, in one of two cases, viz., if he had entered into an agreement to pay, in the event of payment being refused by the acceptor, or, if the acceptor had died insolvent, *ib.*

By the custom of merchants, though the indorsee of a Bill of Exchange was dead at the time it was indorsed to him, his legal representatives are entitled to recover the amount, *8th July, 1819, East's Notes 101, Sup. Ct. Cal.*

* The heirs of a Mussulman deceased may sue on a Bill of Exchange indorsed to him, though the deceased should have made a will appointing an executor, or given verbal directions to others to collect his debts, &c., and to pay over the amount to his widow; such executor cannot sue in his own name, but an action may be brought by a creditor of the deceased, *ib.*

Necessary Debts on account of Minors.—Necessary debts contracted by a guardian on account of his ward must be discharged by the latter on his coming of age, *Macn., Ch. xi., § 6*.

Of Attachment and Sale.—In the attachment, and sale of the property of a debtor great caution is prescribed.

In the first instance, his money should be applied to the liquidation of his debt ; next his personal effects, and last of all his houses and lands, *Macn., ib.*, § 14.

Debt must be satisfied by Compromise or Liquidation.—A debt legally proved cannot be satisfied, but by compromise, or liquidation, *Macn. Prec.* Case xxiv. p. 275 ; so long as the debtor lives he is responsible in person, and on his death his property is answerable, *ib.*

Verbal and Written Engagements.—A claim founded on a verbal engagement is of equal weight with one secured under a written deed, *Macn.*, Ch. xii., § 2.

Informality.—Informality in a deed does not vitiate its validity in other respects, *Macn.*, Ch. xii., § 3.

Priority of Claims.—The general rule with respect to all claims is that priority of date confers superiority of right, *Macn.*, Chap. xii., § 4.

Sale has Preference over Gift.—Where the priority of either cannot be ascertained, a claim founded on sale will be preferred to one based on gift, *Macn.*, Ch. xii., § 5.

Dissolution of Contract.—Contracts are not dissolved in general by the death of either of the contracting parties, unless the subject of the contract be of a personal nature. Such, for instance, as in the case of a lease, if either the landlord, or farmer die, the contract ceases on the occurrence of that event, *Macn.*, Ch. xii., § 6. So in the case of partnerships where the surviving partners are not bound to continue in business with the heirs of the deceased partner, and *vice versâ*, *ib.*, § 7.

This is a very strange rule, and might have the effect of determining the contract the day after it was executed. It is entirely inconsistent with the principle on which the relation of landlord, and tenant is based.

Interest.—The law forbids the exaction of interest ; but the legislature has virtually rescinded this prohibition, *Act xxxii.*, 1839 ; *Sloar's Jud. and Land Rev. Code*, p. 560.

Mortgage.—There is no distinction between mortgages of land, and pledges of goods, *Macn.*, Ch. xi., § 14.

Creditor cannot alienate Mortgage.—The creditor is not at liberty to alienate, and sell the mortgage, or pledge at any

time, unless there was an express agreement to that effect between him and the debtor, as the property mortgaged is presumed to be equivalent to the debt, and as the debt cannot receive any accession, interest being prohibited, *Macn.*, Ch. xi., § 16. See *ante*, p. 168.

Essentials thereof.—Seisin is an essential condition of all mortgages. The law does not recognize hypothecation, *Macn.*, Ch. xi., § 15.*

No distinction exists except as regards pledges and mortgages with respect to priority of debts. Simple and bond debts are on the same footing, *Macn.* 75 n (1).

Use of Pledge.—Where property has been pawned, or mortgaged in satisfaction of a debt, it cannot be used without the consent of the owner, and if he do so, he is responsible for the whole value, *Macn.*, Ch. xi., § 18.

Loss of Pledge.—Where the property being equivalent to the debt, has been destroyed, otherwise than by the act of the pawnee, or mortgagee, the debt is extinguished; where it exceeds the debt, the pawnee, or mortgagee is not responsible for the excess; but if it fall short of the debt, the deficiency must be made up by the pawnor, or mortgagor; but, if the property were wilfully destroyed by the act of the pawnee, &c., he will be responsible for any excess of its value beyond the amount of the debt, *Macn.*, Ch. xi., § 19.

Obligations of Mortgagor and Mortgagee.—It is a general rule that the pawnee is chargeable with the expense of providing for the custody, and the pawnor with the expense of providing for the support, of the thing pledged. Thus: in the case of a horse, it is necessary that the pawnor should provide his food, and the pawnee his stable, *Macn.*, Ch. xi., § 17.

Priority of Claim of Mortgagee.—Where there are other creditors of the deceased, the pawnee, or mortgagee, is at liberty to satisfy his own debt out of the property of the deceased debtor, which is in his own possession, to the exclusion of all other creditors, *Macn.*, Ch. xi., § 20.

* This rule as to seisin is not respected in practice, and mortgages without seisin are as prevalent among Mahommedans as among Hindoos, *ib.* Note by Mr. Sloan, the learned editor of Macnaghten's P. & P.

No Distinction exists, except as regards Pledge, with respect to Priority.—No distinction exists except as regards pledges and mortgages with respect to priority of debts; simple and bond debts are on an equal footing. See *Cas.* 1, iii., *Macn. Prec.* pp. 245, 247.*

Limitation Rules.—The Mahommedan law prescribes no period of limitation beyond which claims are barred, *Macn.*, Ch. xii., § 1. The legislature has, however, supplied this omission. See *Act* xiv. of 1859.

* The Mahommedan law of contracts is not binding on the Mofussil Courts, Reg. III. of 1802, cl. 1, sect. xvi. (Mad. Code), but, it is nevertheless, entitled to respect, because its principles naturally govern the transactions of the people with one another, *Stra. Man. H. L.* p. 73, *Bail. Prelim. Remarks on the Law of Sale*, p. x. The law of mortgage is subject to such modifications as have been introduced by the practice of the Mofussil, and Sudr Courts, founded on the Reg. of the Brit. Government, *Macpherson, Introduction to Law of Mortgage*; *Macn. Prin.*, Ch. xi., p. 75. Note by the learned editor, Mr. Sloan.

CHAPTER II.

PRE-EMPTION OR SHOOFAA.

Definition—Usage foundation of the right—Nature of right—Christians in Behar—Hindoos—Hindoos of Chittagong—Right as against a Hindoo purchaser—Hindoos in Jessore—Extent of right—Who may claim right—A shareholder—Right of co-sharer in an estate sold in execution—Plurality of—One can give his share to the other—Right of vicinage—Separation of estate—Co-sharers—Neighbours—Tenant's Right—Son has no proprietary right in father's holding—Minors—Splitting claims—Affects only real property—With respect to what disposition of property it takes effect—Conditional sale—Fictitious sale—It does not apply to lease in perpetuity—Completion of sale—Private partition—As to portion of land to be sold—Resale—Right of pre-emption—Who may claim—Rights and privileges of—Time of making claim—Declaration of intention—Invocation of witnesses—Tulibi Tshishad—Rights of first purchaser—Lien—Of seller—Where property has been improved while in possession of first purchaser—Where the property has been improved by the claimant, and it appears to belong to a third person—Dispute as to price—Limitation—Evidence—Legal devices by which the claim may be evaded.

Definition.—Shoofaa, or the right of pre-emption is defined to be a power of possessing property which has been sold, by paying a sum equal to that paid by the purchaser, *Macn.*, Ch. iv., § 1.

Usage the Foundation of the Right.—Where a prescriptive usage is proved, or acknowledged to exist in any locality, such usage of itself is law, binding on all classes to whom the usage is prescriptively held applicable. It is unimportant whether the usage has given local force to rules of Mahomedan, or Hindoo, or of any other law; whatever has been so established by usage, has become law within the local limits. It is on this principle that the rules of the Mahomedan law of pre-emption have been held to be in force, May 8, 1841, *Dec. S.D.A. Reg.* 322.

Nature of Right—Christians in Behar.—The right is not matter of title to property, but is rather a right to the benefit of a contract; and when a claim is advanced on such a right, it must be shown that defendant is bound to concede the claim, either by law, or by some custom to which the class of which he is a member is subject, on grounds of justice, equity, and good conscience, *Baboo Mohesh Lall v. Christian*, 8 *W. R. Civ. Rul.* 446. *Cal.*

The enforcement of the right of pre-emption by one of a class acknowledging such right against a Christian on the ground that the said right obtains by custom in the particular zilla, must depend upon evidence showing that the Christians of the district have adopted the said custom, *Baboo Mohesh Lall v. Christian*, 3 *Mad. Jur.* 54.

Hindoos.—Where a Mahomedan seeks to enforce the right, a Hindoo defendant is not bound by that law unless by prescriptive usage, and local custom, *Sheraj Ali Chowdhry v. Runzan Bibee*, 8 *W. R. Civ. Rul.* 204. *Cal.*

Quære.—If the Hindoos of Chittagong have adopted the law of pre-emption, *Nasirooddeen Khan v. Indernarain Chowdhry*, 5 *W. R. Civ. Rul.* 237. *Cal.*

The Right of a Mahomedan as against a Hindoo Purchaser.—The right of pre-emption by a Mahomedan as against a Hindoo purchaser, can only be enforced in Tippera after proof of the right, or custom of pre-emption existing generally in that part of the country, in cases in which Mahomedans are not, or are only partially concerned, *Dewan Munwar Ali v. Syud Azhurooddeen Mahomed* 5, *ib.* 270.

Hindoos in Jessore.—**Quære.** If the law extends to transactions as between Hindoos in Jessore, *Madhub Chunder Nath Biswas v. Tamee Bewah*, 5 *W. R. Civ. Rul.* 279. *Cal.*

Extent of Right.—The right is very special in its character, and is founded on the supposed necessities of a Mahomedan family, arising out of their minute subdivisions, and interdivision of ancestral property; and as the result of its exercise is generally adverse to public interest, it will not be recognized by the High Court, beyond

the limit to which these necessities have been judicially decided to extend, *Nusrut Reza v. Umbul Khyr Bibee*, 8 *W. R. Civ. Rul.* 309. *Cal.*

Who may claim Right of.—A partner in the property sold, a participator in its appendages, and a neighbour, may in this order claim the right of pre-emption in the property sold, *Macn.*, Ch. iv., § 6.

A Shareholder in the property sold has the first, or strongest right, *Gopal Sahi v. Ogoodheapershad*, 2 *W. R. Civ. Rul.* 47. *Cal.*

Right of a Co-Sharer in an Estate sold in Execution of a Decree.—When part of an estate is sold in execution, a co-sharer is entitled to the right of pre-emption, *Imamooddeen Sowdagur v. Abdool Sobhan*, 5 *W. R. Civ. Rul.* 170.

Plurality of.—Where there is a plurality of persons entitled to the privilege of pre-emption, the right of all is equal without reference to the extent of their shares in the property, *Moharaj Singh v. Lalla Bheechuk Lal*, 5 *W. R. Civ. Rul.* 71. *Cal.*

One can give his Share to the Other.—One of the sharers can give over his share to the other before partition, *Muss. Amana Bibee v. Muss. Zeefee Bibee*, 3 *W. R. Civ. Rul.* 37.

Right of Vicinage.—As between owners of adjacent plots of land, if pre-emption exist by right of vicinage, *Quære Nirput Muhtoon v. Muss. Deep Koonwar*, 8 *W. R. Civ. Rul.* 3. *Cal.*

To support a claim on ground of vicinage, plaintiff must be owner of the neighbouring property to that claimed, not merely in possession of it, *Baharee Ram v. Muss. Shoo-vuddra*, 5 *Rev. Civ. and Cr. Rep.* 254.

Separation of Estate.—The law on the ground of vicinage applies only to houses, and small plots of land, not to large estates, or claims of partnership after separation of estate, *Chowdhry J. K. Singh v. Poocha Singh*, 8 *W. R.*, *Civ. Rul.* 413.

It is limited to parcels of land, and houses, and does not extend to the purchase of an entire estate, even though it be entirely surrounded by the lands of the would-be pre-emptor,

Abdul Azim v. Khoud Kar Hamed Ali, 2 Ben. L. R. Ap. Jur. Civ. 63.

In a suit to establish the right on the ground of ownership of contiguous land, no amount of mis-statement on the part of the defendant as to the ownership of such land can relieve the plaintiff of the *onus* of proving his ownership, *Beharee Ram. v. Muss. Shoobhudra*, 9 W. R. Civ. Rul. 455. Cal.

Mere possession gives no "*Huk Shuffa*." There must be ownership ("*Milik*") in the contiguous land, *ib.*

The law was never intended to apply to a case in which the purchaser was not a stranger, but one who is already either a shareholder, or a neighbour, *Tieka Dharee Singh v. Mohar Singh*, 7 W. R. Civ. Rul. 260. Cal.

When property is sold by public auction in execution of a decree, and the neighbour, or partner has the same opportunity to bid for the property, as other parties present in court, the law of pre-emption does not apply, *Abdul Jabel v. Khalatchanara Ghose*, 1 Beng. L. R. 105.

Co-sharers—Neighbours.—One of two joint sharers has no preferential title to the right of pre-emption in his capacity of neighbour, but is equally entitled with his co-sharer to the privilege of pre-emption, without regard to the extent of their shares, *Roshun Mahomed v. Mahomed Kuleem*, 7 W. R. Civ. Rul. 151. Cal.

When the person claiming the right of pre-emption, founds his claim on the ground of partnership, he is not entitled to a decree on the ground of vicinage, because the property sold was nearer to his own, than that of his other partners, *Kunjabehari Lal v. Giridhari Lal*, 1 Beng. L. R. notes of Cas. p. xii.

Tenant's Right.—The law does not recognize the right in favour of a mere tenant upon the land, *Gooman Sing v. Tripool Sing*, 8 W. R. Civ. Rul. 437. Cal.

A Son has no Proprietary Right in Father's Holding.—A son has no proprietary right in his father's holding in a village during the lifetime of the father, and has no right of pre-emption as nephew of the seller, *Khyrat Ali v. Kuramat Ali*, 9 S. D. A. N. W. P. 129.

Minors.—The right of pre-emption accruing during minority is not to be kept in suspense until majority, *Meer Murtaza v. Lalla Nursingh Suhae*, 7 *W.R. Civ. Rul.* 87. *Cal.*

Splitting Claims.—The property of several co-sharers, some of whom were minors, was sold to a single purchaser under a deed of sale, which contained a covenant by the vendors who professed to act on behalf of themselves, and minors, that they would compensate the vendee for any loss he might incur should the minors, when they came of age, not ratify the sale. A. sued to enforce the right of pre-emption in respect of the lands sold. The Lower Ap. Court held that A. could not enforce his claim in respect of the minors' shares, and the plaint was amended, confining the claim, as against the vendors of full age. Held that A. was bound to prefer his claim against all the co-sharers, and not against some of them only, *Abdul Gafoor v. Muss. Nur. Banu*, 1 *Beng. L. R.* 78.

Affects only Real Property.—The right takes effect with regard to property, whether divisible, or indivisible, and applies to real property only; but it cannot take effect until after the sale is complete as far as the interest of the seller is concerned, *Macn.*, Ch. iv., § 3.

With respect to what Disposition of Property it takes effect.—The right takes effect with regard to property sold, or parted with by some means equivalent to sale, but not with regard to property, the possession of which is transferred by gift, or by will, or by inheritance, unless the gift was made for a consideration, and the consideration was expressly stipulated; but pre-emption cannot be claimed where the donor has received a consideration, such consideration not having been expressly stipulated, *Macn.*, Ch. iv., § 2.

Conditional Sale.—It does not arise on a mere conditional sale, or mortgage, while any right of redemption remains in the mortgagor, *Goordyal Mundur v. Rajah Teknarain Singh*, 2 *W. R. Civ. Rul.* 215. *Cal.*

Fictitious Sale.—There is no right of pre-emption where there has been no real bonâ fide sale, according to Mahomedan law, *Muss. Mohno Bibee v. Juggernaut Chowdhry* 2 *W. R. Civ. Rul.* 78. *Cal.*

It does not apply to a Lease in Perpetuity with a rent reserved.—It is not a sale, *Moorooly Ram v. Baboo Huree Ram*, 8 *W. R. Civ. Rul.* 106. *Cal.*

Completion of Sale.—Where the sale has not been completed, and there has not been a cessation of the vendor's right, it was held that, whether under the ordinary principles which relate to contracts of sale, or under those of Mahomedan law, no right could arise in favour of the pre-emptor, *Muss. Ladeen v. Blyro Ram*, 8 *W. R. Civ. Rul.* 255. *Cal.*

The privilege of *Shoofaa* refers to cases in which the sale has been actually completed by the extinction of the rights of the vendor, *ib.*

Private Partition.—A private partition, though not sanctioned by official authority, if full and final as amongst the parties to it, will have the same effect as the most formal partition, on the right of pre-emption, *Gopal Sahi v. Ogoodheapershad*, 2 *W. R. Civ. Rul.* 47. *Cal.*

As to Portion of Land to be Sold.—The right cannot be asserted as to a portion only of lands to be sold, without sufficient grounds for refusing the rest, *Cazee Ali v. Sheikh Musseenloollah*, 2 *W. R. Civ. Rul.* 285. *Cal.*

Resale.—A resale cannot destroy the right in a property the sale of which is admitted by the vendee, *Putooaram v. Sham Lal Bahoo*, 7 *W. R. Civ. Rul.* 206. *Cal.*

A Right of Pre-emption declared, and decreed by a court, is not forfeited by failure to pay the purchase money within a time fixed (*ultra vires*) by the court, *Baboo Gopal Lall Mitter v. Moulvie Synd Murhurmut Hossein*, 6 *W. R. Civ. Rul.* 10. *Cal.*

Who may claim.—The right of pre-emption may be claimed by all descriptions of persons. There is no distinction made on account of difference of religion, *Macn.*, Ch. iv., § 4.

Rights and Privileges of.—All rights and privileges which belong to an ordinary purchaser belong equally to a purchaser under the right of pre-emption, *Macn.*, Ch. iv., § 5.

Declaration of Intention.—There are certain necessary forms to be observed in order to enforce this right. Thus it is necessary that the claimant should declare his intention

of becoming the purchaser immediately on learning of the sale, and that he should with the least practicable delay make affirmation by witnesses of such his intention, either in the presence of the vendor, or of the purchaser, or on the premises, *Macn.*, Ch. iv., § 7.

The claimant must first make the preliminary declarations ; going into his house to get the money before such declaration, is not a compliance with the law, *Mona Singh v. Mosrad Singh*, 5 *W. R. Civ. Rul.* 203. *Cal.*

A mere declaration of an intention to exercise a right not yet accrued, is not a claim of the right of pre-emption. It is immaterial whether a formal demand of pre-emption is made at any other time than after the sale became absolute, *Goordyal Mundur v. Rajah Teknarain Singh*, 2 *W. R. Civ. Rul.* 215. *Cal.*

Invocation of Witnesses.—It is necessary to the enforcement of the right that all the prescribed formalities should be strictly complied with. To the ceremony *Ishtishad*,* or *Talab-ish-hab*, it is essential that there should be an express invocation of witnesses, *Prokus Sing v. Jogeswar Sing.*, 2 *Beng. L. R. Ass. side civil* 12.

Tulibi Ishtishad is a preliminary act, as essential as the *Tulubi Mowasibat*, to secure to the claimant the right of enforcing pre-emption, *Razecooddeen v. Zenut Bibee*, 8 *W. R. Civ. Rul.* 463. *Cal.*

Rights of First Purchaser—Lien.—The first purchaser has a right to retain the property until the purchase money is paid by the claimant, *Macn.*, Ch. iv., § 9.

His right is simply a vendor's lien, that is, a right to retain the property until he has the money from the party claiming pre-emption. It is no part of the law that the claimant must carry the money in his hands, and tender it to the first purchaser. A right of pre-emption may be claimed in respect of land within the plaintiff's Puttee, *Bulbood Singh v. Mahadeo Dutt*, 2 *W. R. Civ. Rul.* 10. *Cal.*

Of Seller.—The seller has a similar right to that of the first purchaser, where delivery may not have been made, *Macn.*, Ch. iv., § 9.

* Affirmation by witnesses.

When the Property has been improved while in Possession of First Purchaser.—Where an intermediate purchaser has made improvements in the property, the claimant, by pre-emption, must either pay for their value, or cause them to be removed ; on the other hand, where the property may have been deteriorated by the intermediate purchaser, the claimant may insist on a proportional abatement of the price ; but where the deterioration has taken place without the instrumentality of the intermediate purchaser, the claimant by pre-emption must either pay the whole price, or resign his claim altogether, *Macn.*, Ch. iv., § 10.

Where the Property has been improved by the Claimant and it appears to belong to a Third Person.—But a claimant by pre-emption having obtained possession of, and made improvements in the property, is not entitled to compensation for such improvements if it should afterwards appear that the property belonged to a third person. He will in this case, recover the price from the seller, or from the intermediate purchaser (if possession had been given), and he is at liberty to remove his improvements, *Macn.*, Ch. iv., § 11.

Dispute as to Amount of Purchase Money.—The right of pre-emption is lost where there is a dispute as to the amount of purchase money, if the plaintiff (instead of offering by his plaint to pay the real amount, whatever it may be) claims to purchase a specific quantity of land at a specific price, and that right is shown to have no existence, *Achurbur Panday v. Buckshee Rum*, 2 *W. R. Civ. Rul.* 38. *Cal.*

Where there is a dispute between the claimant by pre-emption, and the purchaser as to the price paid, and neither party has evidence, the assertion on oath of the purchaser must be credited ; but where both parties have evidence, that of the claimant by pre-emption should be received in preference, *Macn.*, Ch. iv., § 12.

Limitation.—The claimant of pre-emption is at liberty at any period to prefer his claim to a Court of Justice, *Macn.*, Ch. iv., § 8.

Mr. *Macn.*, p. 48, note, says:—“ Much difference of opinion prevails as to this point. It seems equitable that there should

be some limitation of time to bar a claim of this nature, otherwise a purchaser may be kept in a continual state of suspense. Ziffer and Moohummud are of opinion (and such also is the doctrine according to one tradition of Aboo Yusuff), that if the claimant causelessly neglect to advance his claim for a period exceeding one month, such neglect shall amount to a defeasance of his right; but according to Aboo Huneefa, and another tradition of Aboo Yusuff, there is no limitation as to time. This doctrine is maintained in the Fatawa Alumgeeree, in the Mooheetoo Surukhsee, and in the Hedaya; and it seems to be the most authentic and generally prevalent opinion. But the compiler of the Fatawee Alumgeeree admits that decisions are given both ways."

But in a recent case it has been held that the claim should be made as soon as the claimant becomes aware of the completion of the sale, *Mohuul Agoodhya v. Moheen Lal*, 7 W. R. Civ. Rul. 428. Cal.

Evidence.—In a suit to enforce a right, where there is other evidence, and the Court can come to a distinct finding upon it, it is incumbent on the Court to put the purchaser upon his oath. Where evidence is gone into, the Court must decide according to the view it takes of the evidence, any preference which may be given to the evidence for the person claiming the right of pre-emption being given only in the event of the evidence being very nearly balanced, *Hunsraj Singh v. Rash Beharee Singh*, 7 W. R. Civ. Rul. 211. Cal.

In a suit to enforce a right of pre-emption where there is evidence in support of the pre-emptor's statement of price, the Court is justified in proceeding upon that evidence, without calling upon the purchaser to swear to the amount of the purchase money, *Hunsraj Singh v. Choka Singh*, 7 W. R. Civ. Rul. 286. Cal.

Legal Devices by which the Claim may be evaded.—There are many legal devices by which the right of pre-emption may be defeated. For instance, where a man fears that his neighbour may advance such a claim, he can sell all his property with the exception of that part immediately bordering on his neighbour's; and where he is apprehensive of

the claim being advanced by a partner, he may in the first instance agree with the purchaser for some exorbitant nominal price, and afterwards commute that price for something of an inferior value; when, if a claimant by pre-emption appear, he must pay the price first stipulated, without reference to the subsequent commutation, *Macn.*, Ch. iv., p. 49, § 13.

CHAPTER III.

SECTION I.—OF GIFTS IN GENERAL.

SECTION II.—OF BEQUESTS AND WILLS.

SECTION I.

Definition—Father's power over his property cannot be made to take effect in future—The subject of gift must be actually in existence—Must be in donor's possession during his lifetime—Gifts on death-bed—Gifts in health and sickness—According to the Imameeya doctrine—Neither knowledge of heir nor his presence necessary to validity of gift to strangers—Of Hibah-bil-Iwuz—Money forming part of the consideration on both sides—Gift is of two kinds, Hibezbw shurt-ool Iwuz, or Gift on stipulation—Hibah-bil-Iwuz, or mutual gift—Exchange of property for property—Deed of marriage settlement—Hibah-bil-iwuz—Where the marriage which formed the consideration for the gift proved illegal—Deed of gift of realty—Deed of dower previously executed—What property passes under deed of gift of all husband's property in lieu of dower—Of gift by a grandmother to a grandson—Revocation of gift—Legal obstacles by the resumption of a gift—A verbal gift of land is valid—Form of deed of gift—Gift to a second wife by a husband of property belonging to his first wife—Of a gift with invalid conditions—Conditional gift, without consideration, cannot be retracted—Priority of deed of gift by solvent traders—Construction of—In case of invalid gift—If donor attest a deed of sale executed by the donee the sale will hold good—Conditional gift—Effect of gift of all property in possession of husband to wife in lieu of dower—Confusion of gift—Distinction between gift for a consideration and on consideration of a return—Gift of unrealised produce without the land is invalid—Division necessary—Delivery and division must be simultaneous—Boundaries of land—Gift of part of joint property must be distinct—An undefined gift of divisible property is not valid—When specification not necessary—The objection of definiteness does not apply to a gift made to sole partner—Indefiniteness—Exclusive possession—Exclusion of donee from possession—Retraction—Where possession held for twelve years—Gift of partition of landed property—Joint gift—Of supervenient indefiniteness in case of gift of property not in posses

sion of the donor when valid—Gift of land not forfeited by assignment of rent—Delivery of possession—Gift with retention of use void—Undivided gift to three persons without delivery of possession is invalid—Gift must be express and must be relinquished by the donor—Gift to minor—Gift of father and uncle to infant—The legal guardian being absent—Seisin on behalf of a minor by the brother of his grandfather—Where the gift is to a trustee in actual custody of the subject of gift—Accretions in case of invalid gift—Where gift not hereditary.

Definition.—A gift is defined to be the conferring of property without exchange, or a consideration, *Macn.*, Ch. v., § 1.

Father's Power over his Property.—A gift made by a person to the husband of a grand-daughter, although he has a daughter and three other grand-daughters living, is valid, because a person is at liberty to give away his own property, as it suits his inclination. If he pleases he may give it all, to one of his children, or to a stranger, or to beggars. No one of his children, or descendants has a right to oppose his inclination, for the right of the heirs to the property does not accrue until after his death; they have no right to it during his lifetime. If, therefore, notwithstanding he has one daughter, and four grand-daughters, he disposes of all his property by gift to the husband of one of the grand-daughters, the gift is valid, *Macn. Prec.* 238.

Gift of whole Property.—The gift of one's whole property, to the exclusion of his heirs, however sinful, is nevertheless valid, *Macn. Prec.* 227.

Consent of Donor's Heirs.—The consent of the donor's heirs is not requisite to a gift, *Macn. Prec.* 210.

Sale or Gift by Females.—A Mahomedan lady can sell, or give away her property as she pleases, *Mahommed Zuheerul Huq. v. Muss. Butoolun*, 1 *W. R. Civ. Rul.* 79. *Cal.* When a mother makes a gift to her children, and one of them seeks to set it aside as fraudulent so far as it affects the plaintiff's right of inheritance, as long as the mother is alive, and admits the execution of the deed of gift, the plaintiff is not in a position to disturb it, and it is quite immaterial in such case whether the plaintiff's consent was, or was not given, *ib.*

The Subject of Gift must be actually in Existence.—A gift cannot be made of anything to be produced *in futuro*, although the means of its production may be in the possession of the donor. The subject of the gift must be actually in existence at the time of the donation, *Macn.*, Ch. v., § 5.

The Subject of Gift must be in Donor's Possession during his Lifetime.—The gift of a thing not in the donor's possession during his lifetime is null and void, and the deed of gift is of no effect, because seisin is a condition. Gift is rendered valid by tender, acceptance, and seisin ; but, in gift, seisin is necessary, and absolutely indispensable to the establishment of proprietary right. According to the Hedaya, “ Gifts are rendered valid by tender, acceptance, and seisin.” The prophet Nus said, “ A gift is not valid without seisin.” So also if the thing given be pawned to, or usurped by a stranger. So also in the Shurhi Viqaya,—“ A gift is perfected by complete seisin.” As the gift, therefore, is null, the claim of the donee is inadmissible, and the deed is invalid as far as regards the lands of which the donor was never possessed; with respect to the other lands conveyed at the same time, the donee is entitled to them, if the donor put him into possession. If, however, the donor died without conferring possession, the claim of the donee to them is also inadmissible. The reason of this rule is, that seisin and delivery cannot be effected when the thing is not in the possession of the donor. It is of no consequence how the possession has been parted with, even though the proprietary right be expressly retained, or claimed, as in the case of a pledge, or usurpation, but if after the donor recover it, he put the donee into possession, it is sufficient, *Macn. Prec.* p. 202, Cas. vi.

To make a deed of gift valid, seisin is necessary ; if the donor is not in possession at the time, the gift is void, *Abedoonissee Khatoon v. Ameeroonissee Khatoon*, 9 *W. R. Civ. Rul.* 257. *Cal.*

Partial Possession.—Where part only of the property constituting the gift is in the possession of the donee, and the other part in the possession of the donor, the attesta-

tion by the latter, to a bill of sale executed by the former of the entire property, is sufficient to complete the gift, and render it valid, *Macn. Prec.* 223.

Death-bed Gifts.—How far Lawful.—No gifts of an ancestor upon death-bed, or bequests, beyond a third of the clear residue of his estate, after payment of funeral charges, and debts, are binding upon heirs; so that gifts, together with legacies, must not exceed the third of the residue of the estate, unless they are confirmed by the heirs *after* the donor's death, *Hedaya Transl.* vol. 3, p. 162. Assent *before* the death is not sufficient, for the right has not then accrued, and the assent may be annulled by the testator's death, *Hedaya*, vol. 4, p. 470. So gifts in last sickness, and legacies are invalid unless so confirmed, if the donee, or legatee is also an heir. So the acknowledgments of debt made on death-bed in favour of an heir are void, unless *afterwards* assented to by the other heirs, *post.*, "Debt."

Death-bed.—Tumleeknamahs.—A deed of gift, such as Tumleeknamahs, executed at a time when the grantor was labouring under a sickness from which she never recovered, cannot operate, save as a will. If such a death-bed gift or will is made in favour of one who is an heir, the will or gift, as far as it relates to that heir, will be inoperative, without the consent of the other heirs, *Ashruffunnissee v. Muss. Azeemun*, 1 *W. R. Civ. Rul.* 17. *Cal. Macn. Ch.* v., § 3.

In Contemplation of Death.—Effect of will when no Heirs.—Rights of predeceased Husband's Heirs.—A gift made in contemplation of death, though not operative as a gift, operates as a legacy. Ordinarily it conveys to the legatee property not exceeding one-third of the deceased's whole property. Whatever may be the position, and rights of a husband, being the only surviving heir of his wife, the law recognizes no representation in matters of succession, and, therefore, those rights do not descend to the heirs of a husband who has predeceased his wife, and who are themselves no relation of the wife. In fact, under the Mahomedan system, after the dissolution of a marriage contract,

by death, or otherwise, the parties, or their heirs bear no more relationship to each other, than the heirs of quondam partners in the same mercantile house, *Ekin Bebee v. Meer Ashruf Ali*, 1 *W. R. Civ. Rul.* 152. *Cal.*

A Mahomedan lady, or any other woman, may give away property held in her own right; but such a gift made on her death-bed, being looked upon as a will, will be inoperative beyond a certain limit, *Musst. Luteefoonessa Bibee v. Syud Rajaoor Ruhman*, 8 *W. R. Civ. Rul.* 84. *Cal.*

Semble.—A gift made at the time of death is not valid, even to pass one-third of the property, without possession being given, *Sil. Rep. S. A.* 80, *Bomb.*, 8 May, 1832. *Macn.* (ch. v., § 11) says: “A gift on a death-bed is viewed in the light of a legacy, and cannot take effect for more than one-third of the property, consequently no person can make a gift of any part of his property on his death-bed to one of his heirs, it not being lawful for one heir to take a legacy without consent of the rest (*see Bequest, post*).” According to the *Shurhi Viqaya*, “A death-bed gift, though actually made, must be deferred until death, because its conditions are dependent upon that event, for, if the property be insufficient to cover all the debts, the gift will be null, and if there be no debt, it will be good only, as far as a third of the estate.” Also, according to *Madun*, “When a person on his death-bed makes a gift, it must be taken out of a third of his estate,” *Macn. Prec.*, p. 104.

Gifts in Health and Sickness.—A person may make over all his property by gift to one of his heirs, if at the time the donor was in health, and of sound disposing mind; and even though at the time he was sick, the gift is valid, if he subsequently recover from the sickness. But if he died in consequence of such sickness, the disposition holds good to the extent of one-third only of the donor's property, and the remaining two-thirds will be distributed among the other heirs.* According to the *Hedaya*, “It is to be observed as a general rule, that where a person performs with his property any gratuitous deed of immediate operation (that is not

* But the donee being an heir, will not be entitled to one-third even, unless the other heirs consent, *supra*.

restricted to his death), if he be in health at the time, such deed is valid to the extent of all his property ; or if he be sick, it takes effect to the extent of one-third of his property. It is also to be remarked, that a sickness of which a person afterwards recovers is considered in Law as health, because upon his recovery it is evident that no one else has any right to his property." The testimony of the other heirs is not necessary to the validity of the deed. In no contract is the testimony of witnesses a necessary condition, except in that of marriage, *Macn. Prec.*, p. 197.

A deed executed by a Mussulman during an illness of which he dies, is good only for one-third, *Barwell's Notes*, 91, *S. C. Cal.*

Semble.—A deed of gift by a Mussulman upon his death-bed cannot hold good further than it may be considered a bequest, by which a man who has heirs can bequeath only one-third of his property to a stranger, and then the party in whose favour it was made would be entitled, without the consent of the heirs, to one-third of the property, whatever it might be, after all other claims on the estate had been liquidated, *Sil. Rep. S. A.*, 80 *Bom.*, May 8, 1832.

If one of the heirs of a Mussulman, passing property by deed of gift to a stranger, admit the gift, it will hold against his share, *ib.*

Gift according to the Iameeya Doctrine.—By the law as received by the Sheea sect, gift of an aliquot part of an undivided whole is valid, 5 *S. D. A. Rep.* 213 ; 29 May, 1832. So an undefined gift is valid, *ib.*, cited in *Ramrutton Rea v. Farrook-oon-nissa*, *P. C. cas.*

In Azeem-oodin v. Fatima Beebee, 1 *S. D. A. Rep.* 24 ; 27 June, 1799. The law officers, after propounding the doctrine of the Soonee jurisprudents as to the gift of part of any undivided whole and possession, cited these extracts from the *Sharaia-al-islam*, as showing the doctrine of the Sheea doctors on the same subject. "As to immovable and non-deliverable property, possession arises from abandonment of the donee. But if the tenant in common refuse, let the donee direct him to appoint him to be agent for possession ; should he refuse,

let the Ruler appoint an agent to hold for both, to whom the donee may then transfer." The gift is not valid of that, of which possession cannot be given,—for instance, "of a bird in the air, or of a fish in the river." If he give what the owner already holds, it is valid, and there is no need for the permission of the donor to take possession, nor that the time during which possession is possible should have passed, but to this latter position some jurisprudents scarcely incline, *ib.*, *note*.

Neither Knowledge of Heir, nor his Presence, necessary to Validity of Gift to Stranger.—When a person gives his property to a stranger, neither the knowledge of the heir, nor his presence at the time of the gift, is necessary to render the gift good in law, *Macn. Prec.*, p. 210.

Distinction between Gift for a Consideration, and on Consideration of a Return.—There is a distinction between a gift for a consideration (*Hibah-bil-iwuz*) and a gift on a consideration of a return (*Hibaz-ba-shurt-ool-iwuz*). The former is not vitiated by confusion and non-possession, the latter is, 5 *S. D. A.*, *Ben. Rep.* 296, 24 April, 1833.

Seisin by the donee is not necessary to render the *Hibah-bil-iwuz*, or gift for consideration valid, 1 *S.D.A.*, *Ben. Rep.* 10, 18 Nov. 1795.

Delivery of seisin is sufficient, continued possession is not necessary, 1 *S.D.A.*, *Ben. Rep.* 12, 31 March, 1796.

Macnaghten says: "Besides the ordinary species of gift, the law enumerates two contracts under the head of gifts, which, however, more nearly resemble exchange, or sale. They are technically termed *Hibah-bil-iwuz*, mutual gift, or gift for a consideration; and *Hibah-ba-Shurt-ool-iwuz*, gift on stipulation, or on promise of a consideration.

Hibah-bil-iwuz is said to resemble a sale in all its qualities; the same conditions attach to it, and the mutual seisin of the donees is not in all cases necessary.

Hibah-ba-Shurt-ool-iwuz, on the other hand, is said to resemble a sale in the first stage only, that is, before the consideration for which the gift is made has been received, and the seisin of the donor, and donee is therefore a requisite condition, *Macn.*, ch. v., § 14–16.

Of Hibah-bil-Iwuz—Money forming Part of the Consideration on both Sides.—During his life, the deceased made a gift to one of his wives of all his property, comprising household effects, money, and jewellery, in lieu of the dower stipulated for her at her nuptials. After his death, his two wives (by the one to whom he made the gift he had one daughter, and by the other, two daughters) disputed the succession to the property. The gift was *Hibah bil Iwuz*, or gift for a consideration, which resembles a sale, both in principle and effect, but there is a doubt as to the legality of the transaction, because, the articles opposed to each other consist partly of money, which constitutes a *sirf*, sale. In this description of contract, seisin on the spot is necessary to its validity. If seisin was made, the transaction must be held to be valid, if not, it is void, and both parties have a right to recede. The heirs and creditors have a right to set it aside, and resume the property parted with, on repaying the consideration given for it, until which time the property will remain as a pledge in the hands of the purchaser; but when the consideration is restored, it will become subject to the law of inheritance, and in this event it should be made into forty-eight parts, of which each widow is entitled to three, and each daughter to fourteen, *Macn. Prec.*, p. 222.

A man had three wives. By his first he had a son, and two daughters; by his second, two sons, and three daughters; and by his third, only one daughter. The first wife, with her children, were in possession of all the property left by her deceased husband. The second and third wives died before him, but their children survived, and those by the second wife claim forty-nine out of ninety-two parts of the estate. The first wife and her children, the defendants in the suit, pleaded that some years previous to his death the deceased husband made over all his property to the first wife, by deed of *Hibah-bil-Iwuz*, in exchange for three lacs of rupees, due to her for dower. It appeared that although the deed purporting to be a *Hibah-bil-Iwuz* recited that the parties had made mutual seisin of the articles opposed to each other, yet that the husband was in possession of all

the property until his death. In law, gift is of two kinds : it is either unqualified and void of any consideration, as where the donor makes an absolute gift of property, in which case seisin of the property given, is essential to the validity of the gift ; or qualified, of which there are two descriptions, first, *Hibah-ba-shurt-ool-Iwuz*, which is accompanied by the expression of a condition, and consists in a person offering to give to another something on condition of his receiving from the donee something else. In this case also seisin of the thing given is requisite, and it should be defined and separated from the rest of the donor's property. But this description of gift resembles a gift in the first stage only, and sale in the last stage, that is, after the receipt of the consideration. Such a gift, therefore, unaccompanied by seisin, cannot operate to prevent the devolution of the property agreeably to the laws of inheritance, after the satisfaction of all the prior claims on the estate, as debts, &c. Secondly, *Hibah-bil-Iwuz*, which consists in a person saying to another that he has given such a thing for such a thing ; and this description of gift resembles a sale in both stages, agreeably to the universally received opinion ; in this case the seisin of the donee is not an essential condition. The deed executed by the husband was of this description, and, if duly proved, it will supersede all claims of inheritance, *Macn. Prec.*, p. 220.

Hibah-ba-Shurt-ool-Iwuz, or Gift on Stipulation.—But if he had expressed himself to this effect,—that he had made a gift to, and conferred upon her the proprietary right to his entire property, on condition that she would give to him a certain portion of her dower, and the donee accepted the condition, it would be a gift on stipulation. The law considers it in the light of a gift as to the condition, and a sale as to the effect. Seisin is requisite to its validity, and the gift cannot be said to be established until the father shall have made seisin ; but the property conferred remains, as formerly, at the disposal of the donor. He will therefore be at liberty to make a subsequent disposition of it amongst the heirs of his two wives, because an owner has unlimited power over his own property. “ I have given you

this slave for this garment of yours, or for 1,000 dirhms," *Chulpee*, to which proposal the other party assents. This is a contract of sale, both as it regards the condition and the effect. See *Kifaya*. "A contract of sale is established by conferring a right to one thing in lieu of another," *Shurhi Viqaya*. The expressions, "I have given you this for that," or "take it for so much," or "I have sold, or purchased from you," *Hedayu*. Where these exist the sale is complete. By these are meant declaration and acceptance, and when these are found to exist the sale is binding, from which it follows, that seisin is not a condition; and where these do not exist the sale is not binding, *Macn. Prec.*, p. 218.

This case shows the distinction between mutual gift and gift on stipulation, *ante*, p. 187. The distinction, although apparently merely of a verbal nature, does not appear to be wholly groundless. They say the former is a sale in every sense of the word. In sale, mutual seisin is not necessary to render the contract valid, and the terms of the contract imply that the articles opposed to each other are present, and that there is no danger of either party suffering from the other's fraud. "I have given you this for that," implies that the consideration is present, and that the person will take care to receive it before parting with his property; and the law, therefore, annexed to it the quality of a sale, both with regard to the condition and effect. The latter, they say, is a contract of a different nature: the terms used imply a contingency. Thus: "I have given you this on condition of your giving me such a thing." Now in this contract it is observed that, as to the condition, it has the property of a gift, in which seisin is requisite; otherwise, if it were valid and binding without such condition, the consideration might be withheld, and it might thereby become, as it were, *nudum pactum*. As to the effect, this contract is declared to have the property of a sale, that is to say, after reciprocity of seisin, it becomes in effect a sale, *ib.*, *note*.

Hibah-bil-Iwuz, or Mutual Gift.—A person, after the death of the first wife, without relinquishment on her part, or

satisfaction made by him of her claim to dower, marries a second wife, and then confers on her the proprietary right to his entire property in lieu of dower, of which, however, he retains possession himself. Afterwards he executes a deed conveying to the heirs of each of his wives the joint proprietary right in his estate, without reserving any part of it. If in making the gift to the second wife he had expressed himself to this effect : that he had made a gift to, and conferred upon her, the proprietary right to his entire property in exchange of a certain portion of her dower, this is not a gift in consideration of an exchange, but it is a contract of sale, both as to the condition, and effect. In a contract of sale, seisin is not a requisite condition. Indebtedness to his former wife does not preclude him from making a contract of this nature, because a debtor is not debarred from the disposal of his property, and he is not at liberty to make a subsequent disposition of the property sold, amongst the heirs of his two wives, *Macn. Prec.*, p. 216.

A *Hibah-bil-Iwuz* alleged to have been given to a wife in consideration of a claim for dower, was set aside as fictitious and collusive, chiefly on the ground of an agreement taken at the same time from the wife by her husband, so restrictive in its terms as to be evidently framed for the purpose of retaining the entire property under the control of the husband, from whom there was, in fact, no more than a nominal transfer to his wife in fraud of creditors, *S. D. A. Ben.* 105, 13 June, 1849.

Exchange of Property for Property.—In a gift for consideration there must be an exchange of property for property, or property for money, or for a legal appreciative value, *Ranee Roshun Johan v. Rajah Syud Enaet Hossein*, 5 *W. R. Civ. Rul.* 4. *Cal.*

Deed of Marriage Settlement.—A *Kabin namah*, or deed of marriage settlement, containing a gift by the husband to his wife of the whole of the property possessed by him, or which thereafter might come into his possession, is valid with regard to the property in the actual possession of the husband at the time of the execution of the deed, but not in regard to property acquired subsequently by him, non-existent

property* not being capable of being made the subject of a gift, 6 *S. D. A. Ben. Rep.* 30.

A *Hibeh namah* alleged to have been created in favour of his first wife, in satisfaction of her dower by a Mahommedan previous to a second marriage, was set aside, the Court observing there are means of giving unquestionable validity to documents of this nature, inexpensive and easy of access; and if the parties interested refuse to use them, they cannot be surprised if the documents are rejected by the Civil Courts. The well-known habits of the Mahommedan population in respect to marriage settlements, render it incumbent on the courts to guard with suspicious caution all deeds connected with such settlements, 5 *Dec. S. D. A., N. W. P.*, 333, 19 Sept., 1850.

Where the Marriage which formed the Consideration for the Gift proved Illegal.—A gift in lieu of dower is not invalidated by the marriage, on occasion of which the dower was settled, proving illegal by the return of the wife's former husband, supposed to have been dead, 1 *S. D. A. Ben. Rep.* 31.

Deed of Gift of Realty—Deed of Dower previously Executed.—Held, that a deed of gift of real property legally executed is valid against a deed of dower previously executed by the same individual in favour of his wife, in which a sum of money is specified as due to her, without mention of a pledge of real property as security for the dower debt, 6 *S. D. A. Ben. Rep.* 177, 18 July, 1837.

What Property passes under Deed of Gift of all his Property in Lieu of Dower.—Under a deed of gift by a husband to his wife of all his property in lieu of dower, the widow is entitled to all the property he possessed at its execution, and to a share, as heir, of that property which he subsequently acquired, 1 *S. D. A. Rep.* 52, 14 Aug. 1801.

Retraction.—It is not incumbent upon a person to continue to another a gratuitous allowance for life. He has a right to revoke it, because an allowance of this description is a gratuitous donation, which, provided the donee be a stranger, the donor is at liberty to retract; according to this

* *Quære* property not in possession of owner.

passage in the *Hedaya*, viz. “If a man makes a donation to a stranger, he is at liberty to revoke it, unless he has received a consideration for it,” Cas. xxiv. of 1814 ; 1 *Mad. Dec.* 118.

Of a Gift by a Grandmother to a Grandson.—Where a woman made a gift of her entire property to her grandson, a child, aged five years, and afterwards distributed it among all her heirs, including the grandson, the gift to him is valid, and does not admit of resumption, because between the grandmother and her grand-son there exists a relationship within the prohibited degrees, which is an obstacle to resumption. Her distribution of the property afterwards amongst the heirs generally is void, and the former gift holds good. To perfect the gift of a thing which is in possession of the donee, new seisin is not requisite. The gift of a father to his child is perfected by the mere declaration ; whatever gift is made by a stranger to him, he should take possession of, if possessed of sufficient discretion to do so, or his father, or grandfather should take possession of it on his behalf, or the guardian appointed by either of them, or his mother, provided he be residing with her, or a stranger in whose house he has been educated, *Shurhi Viqaya*, *Macn. Prec.* p. 223.

Viqaya.—The gift having been declared valid, and the retraction of it inadmissible, the distribution subsequently made (amongst the other heirs) must necessarily be null and void, whether the donee’s father was dead, or in existence at the time. The *Shurhi Viqaya* above quoted is sufficient to support this answer, to which the following may be added:—“If a father make a gift to his infant son, he, by virtue of the gift, becomes proprietor of the same, provided,” &c. “The same rule holds, when a mother gives something to her infant son, whom she maintains, and whose father is dead, and no guardian provided; and so also, with respect to the gift of any other person maintaining a child under these circumstances. If a stranger make a gift of a thing to an infant, the gift is rendered complete by the seisin of the father of the infant. If a person make a gift of a thing to an orphan, and it be seized on his behalf by his guardian, being either the executor appointed by his father, or his grandfather, it is valid. If a fatherless child be

under the charge of his mother, and she take possession of a gift made to him, it is valid. The same rule holds with respect to a stranger who has the charge of an orphan. If an infant should himself take possession of a thing given to him, it is valid, provided he be endowed with reason," *Hedaya, Macn. Prec.* p. 225.

Revocation of Gift.—Revocation of gift is valid, though it is regarded as abominable under any circumstances. There are several kinds of gifts: some to strangers, some to relatives within the prohibited degrees, and some to those not within them. All may be revoked before delivery to the donee, whether present, or absent at the time of the gift. But after delivery the donor has no right of revocation. When the gift is to a relation within the prohibited degrees, the revocation would not be valid if it rest on a condition, or is referred to a future time, *Baillie, Dig. of Mahom. Law*, 524.

Legal Obstacles to the Resumption of a Gift.—There are seven legal obstacles to the resumption of a gift:—

1. The incorporation of an increase with the gift.
2. The death of either of the parties to the gift.
3. A return of the consideration by the donee to the donor.
4. Alienation of the gift.
5. The parties being husband and wife.
6. The relation within the prohibited degrees of marriage.
7. The destruction of the thing given, 3 *Hed.* 300, 301, *S.D.A. Ben. Rep.* 189.

Macnaghten, Ch. v., § 13, enumerates them thus:—

Where the donee is a relation. Where anything has been received in return. Where it has received any accession. Where it has come into possession of a second donee, or into that of the heirs of the first (see *Baillie's Dig. M. L.*, p. 525); but *Macn. Prec.* p. 224, enumerates them, as in the *Shurhi Viqaya*, thus: 1. The incorporation of an increase with the gift. 2. The death of the donee. 3. The donee giving the donor a return or consideration. 4. Alienation of the gift. 5. The parties being husband and wife. 6. Relation within the prohibited degrees. 7. Destruction of the thing

given ; and he appends (*ib.*) the following note :—“ In *Prin. Gift 13*, only five impediments to resumption are enumerated ; but the fact of the parties being husband and wife was included in the prohibition regarding relations. The destruction of things given was inadvertently omitted. The death of the donor also operates as an impediment.”

Where none of these obstacles to the resumption of a gift exist, the Civil Courts on application by the donor will grant permission to reserve the gift, and not call for evidence as to the cause of the desire of resumption ; and such permission is legal and valid, 6, *S.D.A. Ben. Rep.* 189, 7 November, 1837.

There is, therefore, no revocation of gifts to fathers, and mothers how high soever, or children, how low soever, the children of sons and daughters being alike, so of brothers and sisters, paternal uncles and aunts ; but where the prohibition is for some other cause than consanguinity, it does not prevent revocation, as in the case of fathers and mothers, or brothers and sisters by fosterage, or of mothers of wives, step-sons, and the wives of sons, and husbands of daughters, who are prohibited by affinity, *Baillie's Dig. M. L.*, p. 525.

A Mussulman, on account of old age and infirmity, without deed, transferred without specification of shares (*bil ijmal*) his landed estates to his three sons (of whom the defendant is one) by means of a petition preferred to the collector. Two, out of the three sons, at their father's solicitation, relinquished the villages to the latter, but the third son refused to do so, representing that he had given to his father the surplus collections of the villages. It was held, that the absence of a written deed does not invalidate the transfer, which may be proved by oral testimony, with or without documentary evidence ; therefore, if this person transferred his landed property to his three sons, and put each of them in possession of his separate share, and effected the registration of each of their names in the place of his own, and they collected the rents, whether they kept the same for themselves, or made them over to their father with their own free will (*tuburrooz*), the transfer is valid, and the father has no right to resume the property from his sons, the relationship between the parties being prohibitory of such revocation, and the son

who declines to restore the estate cannot be compelled to do so, *Dec. S. D. A., N. W. P.* vii., 30 Mar. 1852.

Unconditional Gift without Consideration cannot be retracted.—An unconditional gift without consideration is valid, though the donee be not of kin to the donor; and cannot be retracted where a transfer has been made by a donee to the third person, or where the donee has improved the gift, or where the donor or donee are spouses, 5 *S. D. A.*, *Ben. Rep.* 355, 26 April, 1834.

If after the execution of a deed of gift, possession be also given, the gift cannot be revoked, 6 *ib.*, 16, 9 Jan. 1835.

A Verbal Gift of Land is Valid.—If a donor separated the landed property, which he disposed of by gift, and put his wife into complete possession and enjoyment of it, the gift is good and valid; and if the donee make a verbal gift of the property which she had so acquired to her grandson's wife, and put her into possession, such gift is also good and valid, *Macn. Prec. Cas.* ii., p. 198.

A gift orally conveyed is valid, because tender and acceptance are the only essentials to a gift; and complete seisin of the lease, the subject of gift, none of the donor's property being therein, and its not being used for his benefit, are the only conditions to perfecting the gift. A writing, or deed, is neither among the essentials, nor conditions. Therefore, if oral tender and acceptance are established, and the condition of complete seisin exists, that is to say, that the thing given was in no manner employed for the benefit of the donor, and that it was not undefined, the gift is valid, although no deed may have been executed, *Macn. Prec.* p. 234.

Form of Deed of Gift.—Where a deed was not in the form *Hibah Nameh*, and was in its own language obscure, yet as it contained the words *dàdeh shud*, “it was given” (by me), the deed was held good, 2 *Borr. S. A., Bom.* 179, 9 Jan. 1822.

Gift to a Second Wife by a husband of property belonging to his first wife is not sufficient, though made by the written permission of the latter, for the consent of the first wife is wanting to give effect to the deed of gift after its execution by the husband, *Macn. Prec.* p. 228.

Of a Gift with Invalid Conditions.—Two widows and a

daughter were the heirs of a deceased man. After his death the widows gave to the daughter all their right and title in the husband's property, the donee engaging to provide her mother, during her life, with food and raiment, and to perform her funeral ceremony and obsequies. The rents were paid to the donee, who afterwards, before the death of her step-mother, disposed of the property by gift to the defendant, who, four months after the death of the donor (she having died before her step-mother) took possession of all her property under the gift. The donee was the son of the donor's uncle, but whether of a paternal, or maternal uncle did not appear. The gift was valid, "If two persons jointly make a gift of a house to one man, it is valid," *Viqaya*. The agreement executed by the daughter in favour of the mother, does not invalidate the gift, for gifts are not affected by being accompanied by invalid conditions. The gift is perfected by the donor's delivering the possession to the donee, *Hedaya*. So "Gift is perfected by seisin," *Viqaya*. Nor can the donor revoke the gift to her daughter, first, because of the death of the donee (see p. 194, *Cunzood duquaiq*;) secondly, because the relation is within the prohibited degrees. See p. 194, *Hedaya*. As the son of the donee's uncle did not take complete seisin of it during the donee's life, the gift to him is void, *Ibrahim Shahee, Hedaya; Macn.*, Ch. v., § 13. The property, therefore, should be considered as the estate of the daughter. After paying the usual charges, if there remain any surplus, it should be divided into three parts, of which one will go to the mother as her legal share, and the remaining two to the son of her uncle (if paternal uncle), as residuary, otherwise he will not be entitled to any share of the inheritance, and the mother will take the whole property left by the daughter in satisfaction of her legal share, and on account of the return. The reason is, that a paternal uncle's son ranks as a residuary heir, and inherits together with a legal sharer; whereas a maternal uncle's son ranks as distant kindred, who are excluded if there be any legal sharer entitled to the return, *Macn. Prec.* p. 215, and *note*.

Priority of Deed of Gift by Solvent Trader — Construction of.—A deed of gift for a consideration, *bonâ fide*

executed by a trader to his wife, he not being shown to be in debt at the same time, or that he executed it in contemplation of insolvency, is good against subsequent dispositions of the property. Such a deed of gift must be construed according to the rules affecting the laws of sale, and the validity of a sale is derived not from the seisin, but from the contract, 1 *Term*, 1843; 1 *Fulton*, R. S. A. Cal. 152.

In case of Invalid Gift, if the Donor attest a Deed of Sale executed by the Donee, the Sale will Hold Good.—A woman made a gift of her estate to another, upon condition that the donor should enjoy the property during her life, and afterwards it should devolve upon the donee. The donee entered upon the estate (with the exception of a small portion, of which the donor kept possession), and received the rents and profits, and paid them to the donor. The donee alienated the estate by deed of sale, to which the donor became a party by affixing her name afterwards. The latter made a gift of the estate to a third party. In this case the gift was not perfected, for want of complete seisin, for the donor retained possession of a portion of the estate. This does not constitute delivery sufficient to establish the validity of the gift. Had the donee been put into possession of the whole estate, the gift would have been complete, and the condition reserved, void; but as the donor retained a part in her possession, complete seisin cannot be established, without which a gift is of no effect; but as the donor formally affixed her signature to the deed of sale executed by the donee, such act indicates her being a consenting party to the sale, as that the contract was entered into by the desire of the donor, as well as of the donee. Under these circumstances the deed of sale must be considered valid and binding, and the contract founded thereon must be upheld. The donor has no authority afterwards to dispose of the same estate to another, *Macn. Prec.* p. 222.

This decision would seem at first sight to be contrary to the general doctrine of gifts; but although not expressly mentioned, the reason for maintaining the validity of the sale was the fact of the donor's having parted with the

possession of the thing given, and made it over to the donee to be delivered to the vendee when the gift ceased to be invalid; and it is a rule that resumption cannot take place after the property shall have been transferred to a third person, *Macn. Prec.* p. 223, and *note*.

Conditional Gift.—Conditional gifts are invalid; if, however, seisin has taken place, the gift is to be upheld, but the condition is to be cancelled, *Elb.* 120.

The gift cannot be resumed on the plea of non-fulfilment of the condition, *ib.*

If the condition has been performed by the donee, the gift is received as a sale, or transfer for consideration, and as such will be upheld, *Elb.* 120.

The plaintiff gave up her share of an estate to the defendant on condition that if a son should be born to the defendant by her husband, the share should vest in her son; and if no such son were born, then it should revert to the plaintiff and her heirs. Held, that the gift was conditional, and that the property was taken in trust by defendant, who bound herself to restore it should no son be born to her by her husband, or should the possibility of such an event cease to exist, *Dec. S. D. A.* 437, 20 May, 1852.

Where a Mahomedan woman, in exchange for a Champakali, or necklace, gave half of her property to another person, on condition that the latter should not alienate it, but leave it on her death to two individuals named in the deed of conveyance, it was held that the transaction being a gift for a consideration, was according to law in reality a sale; that the conditions of the deed were not binding; and that on the death of the vendee the property would descend to her heirs, to the exclusion of the persons in whose favour these conditions were made, 4 *S. D. A.*, *Ben. Rep.* 334, 5 Feb. 1829.

Effect of Gift of all Property in Possession of Husband to Wife in lieu of Dower.—Where a Mahomedan had transferred by gift all the property in his possession to his wife in lieu of dower, it was held, that such gift did not bar an action against his estate for property which had come into his hands as executor, 1 *S. D. A.*, *Ben. Rep.* 150.

It appeared, from the opinion of the law officers, that a

creditor could not have recovered against the wife from the assets which came into her hands by gift from her husband, but that he had no power to give what was not his own; the donation of any property not actually his, could be no bar to the suit. The Court, under this opinion, considered the amount of the property in the hands of the executor to be unalienable by him, and proper to be separated and deducted from the donation of the estate made by him in favour of his wife. The other point of Mahomedan law which came under consideration in the decision of the cause, was the limitation of the legacies to one-third of the testator's property, exclusive of funeral charges and debts, *Macn.*

Confusion of Gift.—A gift is vitiated by confusion, 5 *S. D. A.*, *Ben. Rep.* 136.

But *semble*, the Court will consider a gift for a consideration is, in effect, a sale and purchase, and is not vitiated by confusion of property, or defect of possession, 5 *S. D. A.*, *Ben. Rep.* 239, 28 Nov. 1832.

Gift of Unrealized Product without the Land, Undefined Seisin.—A person left two sons and a widow. The eldest son, during his lifetime, continued in possession of the estate of his deceased father, providing for the maintenance of his mother, and younger brother. The eldest son died, leaving his mother, brother, a widow, and a daughter. After his death his widow, daughter, and brother agreed that ten out of sixteen shares of the landed property should belong to his brother and mother, and the remaining six to his widow and daughter. The parties separately enjoyed the profits of their respective allotments, although no partition of the lands took place. Afterwards, the brother made an assignment, in the nature of a gift to a stranger, of the profits of two, out of his ten-anna share. The gift is invalid, and, after the death of the donor, absolutely void, and the property will revert to the heirs of the donor, because the produce only was transferred, the land being the common property of all the heirs, it not having undergone division; and the gift of unrealized produce without the land, is wholly invalid. Whether the donee was, or was not put into possession of the produce of the common lands, the gift is invalid, for an undefined

seisin does not constitute legal seisin. The mother, or any other heir of the donor, is therefore at liberty to dispossess the donee. The mother was not competent to make over by gift to the donee all the property belonging to her husband, because, the estate of her husband was the joint property of all the heirs; a gift even of her own portion is invalid, that being undefined, and not admitting of legal seisin. In the *Shuri Viqaya* it is laid down, "That the gift of milk in the udder, of wool upon the back of a goat, of grain, or trees upon the ground, or of fruit upon trees, is in the nature of gift of an undefined part of a thing; and such gifts are prohibited, unless separated from the property of the donor, and seisin be subsequently made of them." But if the trees were not cut down, and the donee did not make regular seisin during the lifetime of the donor, the heir of such donee is not competent to come in, and to establish the validity of the donation by the performance of an act on his own part, because, he is quite a stranger to the transaction. The acceptance was not expressed by the heir, but by the ancestor, who died before separation and seisin. In the *Hedaya*, Ch. *Retraction of Gifts*, it is laid down: "If the donor should die, his heirs are strangers with respect to the contract, since they made no tender of the thing given." It appearing, therefore, that the property was not separated, and delivered into the possession of the donee, the right was not transferred from the donor during his lifetime, and after his death it devolves on his heirs. It is laid down also in the *Hedaya*: "Seisin in cases of gift is expressly ordained, and consequently a complete seisin is a necessary condition; but a complete seisin is impracticable with respect to an indefinite part of *divisible* things, as it is impossible in such to make seisin of the thing given without its conjunction with something that is not given, and that is a defective seisin." So also in the *Viqaya*, "Gift is perfected by complete seisin;" and in the *Shurhi Viqaya*, "A gift of part of a thing which is capable of division is not valid, unless such part be divided off, so that seisin may be definite and not include anything else." It is evident, therefore, that a seisin of undefined property is itself indefinite, and cannot be considered valid. The principle

involved in this case is, that in the instance of trees growing on the land, and not cut down, they are mixed with the land itself, which is other property, and which formed no part of the gift, and consequently that seisin of the gift cannot take effect without including in the seisin, something which formed no part of the gift. The same objections apply to unrealized produce, independently of which, the gift of anything to be produced *in futuro* is null and void, even though the means of its produce be in the possession of the donee. See *Macn.*, Ch. v., § 5, 6; *ante*, p. 183; *Macn. Prec. Cas.* viii. p. 205.

Division Necessary.—In a gift of partible property division is essentially necessary prior to delivery, 4 *S. D. A. Ben. Rep.* 210, 13 Feb. 1827; *Macn. Prin.* Ch. v., § 6.

Where there are Two Donees.—In the case of a gift made to two or more donees, the interest of each donee must be defined, either at the time of making the gift, or on delivery, *Macn.*, Ch. v., § 7, *Prec.* 201. Gift of undefined property, though divisible, to two paupers, is valid, *Macn. Prec.* 211.

Delivery and Division must be Simultaneous.—That which is capable of division, when given to two persons, should be divided by the donor at the time of the gift, or immediately subsequent to the transfer, and prior to the delivery to the donees, in order that the objection of confusion may be avoided, and full and complete seisin obtained, which is essential to the validity of the gift. It is not sufficient that the property should be divided by the donees, with consent of the donor, two or three months subsequent to the date of the deed of transfer. It is essential that the division and delivery should be simultaneous, *Macn. Prec. Cas.* v. p. 201.

Specification—Boundaries of Land.—In a deed of gift of land it is not necessary to specify their boundaries if well known, *Macn. Prec.* p. 209.

If mention of the boundaries was omitted in the deed of gift, the omission must be attributed to an error on the part of the scribe, because it is customary in documents of this kind to insert the boundaries. But such error does not vitiate the gift. If there exist a doubt respecting the

boundaries of the lands given, a specification of them at the time of gift is necessary, *ib.*

The specification of each individual article comprised in a gift of property is not necessary to the validity of the gift, if the articles given were clearly known to the donor and donee, and the latter accepted and took possession of them. In drawing up legal documents, specification is usual, but if omitted, the gift itself is not invalidated, *Macn. Prec.* p. 210.

Gift of Part of Joint Property must be Distinct.—It was declared by the law officer that a gift of land forming part of joint property, to be valid, must be distinct, and the boundaries and extent of the property given be known, 1 *S. D. A. Ben. Rep.* 12, 31 Mar. 1796.

An Undefined Gift of Divisible Property is not Valid.—The gift of property which is undivided and mixed with other property, admitting at the same time of division or separation, is null and void, unless it be defined previous to delivery, for delivery of the gift cannot in that case be made without including something which forms no part of the gift, *Macn.*, Ch. v., § 6.

Where A, by deed, assigned to his wife in satisfaction of dower whatever *Zamindari* properties and personal effects he owned and held, it was decided, that the quantity of the consideration being undefined and unknown, the deed was inoperative and illegal, so that the total obligation remained in force against the husband, 5 *S. D. A. Ben. Rep.* 304, 9 May, 1833.

The gift, whether with, or without a consideration, of undefined property, capable of being rendered distinct and separate, is invalid; but the sale of such property is allowable, and holds good as far as the right and title of the seller is concerned; but it cannot affect the interests of parties not privies to the contract, *Macn. Prec.* Case iii. p. 199.

When Specification is not Necessary.—Specification is not requisite where the gift comprises the whole property of the donor, and is made in favour of only one donee, *Macn. Prec.* p. 210; 6 *S. D. A., Ben. Rep.* 44, 10 Nov. 1835.

It is necessary that the subject of the gift should be

defined and distinct, and separated from all other property not intended to be conveyed, or which cannot be lawfully conveyed by gift, and when four out of twelve parts of certain property intended to be transferred were devoted to religious purposes, and which, therefore, could not legally be transferred by gift, it was held, that the gift of the eight portions was invalid, as they were transferred simultaneously with the four portions, the transfer of which was illegal, 3 *S. D. A. Ben. Rep.* 44, 2 Aug. 1820.

There was another objection against the gift in this case, which was not noticed by the parties, but which would have equally operated against the appellant, namely, that the donor did not relinquish possession during his life; and the sale between the same parties for the personal property was decided in favour of the respondent on the same ground, *Macn. by Sloan*, p. 434.

Where a deceased proprietor made an undefined gift of half his property to the widow and daughter of his deceased son, without specifying their respective shares, and he caused them to execute an agreement nominating him (the donor) to be manager of the half given to them, paying them, however, during his life half the profits, if the property be of an indivisible description, such as a mill, or a pond, the gift will be valid. But if the property was divisible, such as land, and there were two donees, whose respective shares were not defined, all authorities concur in admitting the validity of the gift if the donees were paupers, or in indigent circumstances, and it cannot be resumed after the death of the donor; but if the donees were rich, the gift would be invalid, and seisin will therefore be of no avail. The death of the donor, or donee operates to exclude the resumption of the gift,* *Macn. Prec.* p. 212, *ante*, p. 194.

The Objection of Indefiniteness does not apply to a Gift made to a Sole Partner.—The objection of indefiniteness is not applicable to a gift made by a person to his sole

* It is a principle of law, that in the case of a gift to two, or more donees, the interest of each should be separated, and defined, *ante*, p. 202. The exception to the rule in the case of a charitable gift to paupers, is accounted for by two arguments, which are referred to in *Macn. Prec.*, *supra*, note.

partner, because in such case the objection of indefiniteness, arising from a confusion of separate interests, which renders a transfer invalid, does not exist, *Macn. Prec.*, p. 212.

Indefiniteness—Exclusive Possession—Exclusion of Donee from Possession—Retraction.—A person gives an undefined part of lands belonging to a certain village to his daughter's sons. He afterwards makes a gift of the whole of the village lands, together with all his other property, to the son of his son, he being dead.* There were others who had a right of partnership in the property so alienated. He had two daughters at the time he made the gift; and he retained the property during his lifetime, the donee being excluded from possession. The gift to the sons of the daughter was invalid for indefiniteness, and also for having been retracted (see *ante*, p. 192). The second gift is invalid, because the donor had not exclusive right, and he had retained possession during his lifetime, and the donee was excluded from possession, *Macn. Prec. Cas. vii. p. 203*, see pp. 192, 207, *Retraction*.

When Possession held for Twelve Years.—The objection of indefiniteness does not apply to a gift under which possession has been held for upwards of twelve years, 3 *S. D. A. Ben. Rep.* 176.

Gift of Portion of Landed Property.—The gift of a portion of landed property, without distinct allotment of it, and delivery of seisin to the donee, is not valid, 1 *S. D. A., Ben. Rep.* 24, 27 June, 1799; *ib.* 25, 9 Aug. 1799; *ib.* 113, 27 Nov. 1805; *Macn. by Sloan*, p. 435.

Joint Gift.—As to the validity of a joint gift without discrimination of shares, the authorities differ, but the prevailing opinion admits the validity of such a gift. But it would not be valid for property included in, or inseparably attached to, that of another person (so as to be undefined), *ib.*, *note*.

Where the estate which the donee transferred by gift to her adopted son was held to be in joint proprietary right with her brother, the gift will be void for indefiniteness, the brother having a joint proprietary right, *Macn. Prec.* p. 231.

Of Supervenient Indefiniteness in case of Gift—Gift of

Property not in the Possession of the Donor, when Valid.

—If the property of two brothers, who left two widows, be insufficient to satisfy the debt of dower which their widows have a right to claim, the whole property will devolve on them; but if there should be a surplus, the property will first be applied to satisfy their claim; and the surplus will be made into four parts, of which one-fourth will go to the widows, in right of inheritance, if there are no children, nor sons' children. If no dower be due, and the widows' claim thereto should have been otherwise satisfied, one-fourth of the whole property will go to them, and the remaining three-fourths will go to the other heirs of the husbands, *Macn. Prec.* p. 207.

If the widows were seised of their husbands' property in virtue of proprietary right, as, for instance, in satisfaction of their dower, they are entitled to dispose of it by gift; otherwise they can only dispose of it to the extent of their own interests, and their gift of the whole, in favour of one of their husbands' heirs, is invalid. According to the first supposition, the property given, after complete seisin by one of the husband's heirs, will belong exclusively to him as donee. According to the second, the donee will take the property to the extent only of the donor's interests, and the remainder will go to such person, or persons as may be entitled thereto by right of inheritance; for, in this case the gift is not rendered invalid by reason of the donor's not possessing exclusive proprietary right, inasmuch as the indefiniteness was supervenient.* Although the widows at the execution of the deed of gift were not seised of the property, yet, if agreeably to their desire, the donee, in pursuance of a judicial decree, become subsequently seised

* *i.e.* Where a person makes a gift of property, of which apparently the donor was the sole proprietor, but, to a part of which the right of a third person was established at a period of time subsequent to the gift, the donee will take to the extent of the interest of the donor, notwithstanding the supervenient indefiniteness, or, in other words, notwithstanding the fact of its being subsequently ascertained that the donor was not sole proprietor of the property given at the time of gift. It would have been otherwise had the right of a third person been recognized to exist at the time of the gift, which would in that case have been null and void, *ab initio*, *Macn. Prec., tit. Gift* p. 208, note.

thereof, the fact of the donor's having been out of possession at the time of making the gift is not sufficient* to invalidate it. It is laid down in the *Buhroorayiq*, "Gifts of Outstanding Debts:" A man makes over his outstanding debts by gift to a person who is not indebted to him, directing the donee to collect such debts, and take them for his own use, this gift is valid,† *ib.*

• **Gift of Land not Perfected by Assignment of the Rents.**—Where the rents due from certain tenants of one of the villages of the estate were assigned to the donee, but the rents of that village were taken collectively by all the sharers, it was held, that the mere specification of certain of the tenants of one of the villages, without a separation of the lands which they occupied, and a definement of boundaries, and without making any division, the gift of no part of the village is good; but if there was a regular separation of such lands from the remainder of the estate by means of measurement, and the quantity occupied by the tenants defined, the lands so divided off must be considered an independent portion of the estate, and not being indefinite, the gift of such one-fourth part of the village must, on the donee's making seisin, be held to be complete and binding, *Macn. Prec.* p. 240.

Delivery of Possession.—Acceptance and seisin on the part of the donee are as necessary as relinquishment on the part of the donor, *Macn.*, Ch. v., § 2; 6 *S. D. A.*, *Ben. Rep.* 286, 20 April, 1840; even where the gift is by deed, *Dec. S. D. A.*, *Ben.* 932, 24 Nov. 1853; 2 *Borr. S. A.*

* But it is, nevertheless, necessary that possession should be given by the donors as soon as they have it in their power to do so, although a new formal declaration of gifts is not necessary, but the property should be in existence at the time of the gift, though not absolutely necessary that it should be in the possession of the donor, *Macn. Prin.*, Ch. v., *ante*, p. 183. See Case vi. In this case the donors appear to have been alive when the suit was brought; in that the donor was dead, and had not possession during his lifetime, which constitutes the difference between the two cases. In one, possession could not be given by the donor; in the other, death prevented the delivery, *ib.*, note by Sloan.

† Baillie, in his *Treatise on Sale*, p. 5, shows from the *Hedaya*, Vol. iii. p. 208, that the sale of a debt is invalid; and the quotation referred to implies that the transfer even is objectionable, Note by Sloan to *Macn. Mahom. Law, Prec.*, Case x. p. 209.

468, *Bomb.*, 19 July, 1824; *Doyne v. Paul*, 5 *Rev. Civ. and Cr. Rep.* 216.

It is necessary that seisin should take place immediately, or if at a subsequent period, by desire of the donor, *Macn.*, Ch. v., § 4.

A Mahomedan husband executes a *Hibah*, or deed of gift, without consideration, in favour of his wife, comprising a house in which they are residing at the time, with its furniture, and two other houses. He, at the same time, delivers the *hibah* and the keys of the houses to his wife, quits the house of residence, leaving her in possession of the same.

Held, that the requirements of Mahomedan law, with regard to gifts without consideration, viz. acceptance and seisin on the part of the donee, and relinquishment on the part of the donor having been complied with, though the husband shortly afterwards returned to the house, resided there with his wife till his death, and received the rents of other parts of the property comprised in the *hibah*. The continued occupation or residence, and receipt of rents, are in such circumstances to be referred to the character which the donor bears of husband, and to the rights and duties connected with that character, *Amina Bebee v. Khatijah Bebee*, 1 *H. C. R. Bomb.* 157.

Contingency—Postponement.—A gift cannot depend upon a contingency, or be postponed, but possession must be immediate, *Macn.*, Ch. v., § 3, *Ranee Roshun Jahun v. Rajah Syud Eneat Hossein*, 5 *W. R. Civ. Rul.* 4 *Cal.*

In the case of gift, seisin has been especially ordained; therefore, complete possession is made a condition, *Hedaya*. Gift is perfected by complete seisin in such manner as the nature of the gift may admit of, moveable and immoveable property have each their appropriate mode of seisin, *Shurti Viqaya*. Proof of right to a gift depends upon its being separated and delivered, *Merza Chulpee*. But if the subject of the gift be employed for the use of something that is not given, there is no complete delivery. Thus, where a house is given and delivered, but there are some of the effects of the donor in it, *Kazee Khan*. Gift with the retention of use

is void, *Foosool Imadecya, Ashbah-o-Nuzayir, Kaze Khan; The Moajurrud.*

The gift of a house is void if the donor subsequently occupy it, or retain any part of his property therein, *Macn. Prec.* p. 231.

An Undivided Gift to Three Persons, without Delivery of Possession, is Invalid.—A husband executed a deed of gift of all his property to his three wives, by each of whom he had issue, but had not divided it, or put them in possession. The deed is invalid, the heirs of the donor, whoever they may be, inherit his property. Whether viewed in the light of a bequest, or of a gift, the transaction was invalid, for in the former case he could only bequeath one-third of his property, and in the latter seisin was necessary.* And if any one of the widows, or their heirs, should dispose of a portion of the land which belonged to their deceased husband, by gift or sale, the gift would be invalid, but the sale valid to the extent of their own shares, so much as they would legally succeed to, by inheritance. They cannot, however, sell defined portions (by land measurement) of their shares. The reason is, that to render gift valid, seisin is requisite; but as the widows' shares are uncertain, there cannot be seisin of what in itself, is unknown and undefined. A sale, on the other hand, is allowed, because it is not necessary to the validity of such contract, that present seisin should take place. Possession may take place after the share sold has been defined by partition. In fact, it is a sale of the seller's right and title, whatever that may prove to be; but sale specifying the extent of interest by land measurement, when the extent is unknown, and undefined is preposterous and illegal, *Macn. Prec. Cas.* iv., and note.

A Gift must be Express, and must be Relinquished by the Donor.—A gift cannot be implied; it must be express and unequivocal, and the intention of the donor must be demonstrated by his entire relinquishment of the thing given; and the gift is null and void where he continues to exercise any act of ownership over it, *Macn. Ch.* v. § 8.

* See cases where it was held that property given by donor, in lieu of dower, need not be accompanied by delivery of seisin, *ante*, pp. 187, 214, *et seq.*

Exceptions.—The cases of a house given by a wife, and of property given by a father to his minor child, form exceptions to the above rule, *ib.* § 9 ; *Prec.* p. 231.

Trustees.—A formal delivery and seisin are unnecessary where the donee is already in possession as trustee, *Macn. Ch. v.*, § 6.

Seisin of a Guardian.—In the case of a gift to a minor, the seisin of the guardian is sufficient, *ib.*

A deed of gift from a father to his minor son of property, of which possession was not delivered at the time of the gift, or during the father's life (about four years beyond the date of the deed), was held valid, for the presumption is that the father was trustee for the minor, and one-fourth of the property conveyed by the gift was adjudged to the son's widow, as his heir, in addition to her dower, 1 *S. D. A. Ben. Rep.* 31 ; 26 Nov. 1800.

A deed of gift, by a woman to a minor, who was received into her family as an adopted son, of property of which possession was not delivered at the time of the gift, or during the life of the donor, who retained possession of it, on behalf of the minor, was held to be valid and complete in law, notwithstanding that the father of the minor was alive ; but a claim under that instrument to a portion of a joint undivided estate was resisted, the gift of such property being invalid, 2 *S. D. A. Ben. Rep.* 180, 3rd May, 1816.

Where a widow claimed, under a *dibeh nameh* by her husband in her favour, to prevent the sale of her husband's house, attached in execution of a decree against him, it was held, that as the property given had not been transferred to the possession of the donee, but had remained, until the attachment, partly in the hands of the donor, and partly in those of his cousin, the *dibeh nameh* was invalid, 2 *Borr. S. D. A.* 611, *Bomb.*, 26 July, 1823.

A *hibeh*, or gift, is fixed by the *Ijab-i-Rabul*, or “acceptance of a verbal gift,” and a *hibeh nameh*, in which the *Ijab*, or “verbal offer,” alone is written, not the acknowledgment, or *kabul*, and which is not followed by possession, is invalid, and cannot be executed, *ib.*

Land being joint property cannot be bestowed by a *hibeh*

nameh ; but if the donor, having separated his share, should give it away, and the donee *should take possession*, the gift would then be valid, for, by the law, possession is an indispensable part of a gift, which is not valid without it ; and in a suit by a Mahomedan against the heirs of a woman deceased, for her *wazifah* lands, his property, under a deed of gift executed by her in his favour, the Court held, that the possession of the lands by him not being proved, or that he enjoyed any income from them, dismissed the suit, 2 *Borr.* 648, *S. A. Bomb.* 648.

Gift of Father and Uncle to an Infant.—Two married brothers lived together in union ; one of them had a son, and three daughters. Both brothers conveyed their entire property to the son, who was then seven and a half years old ; such a gift is valid, provided there was the necessary seisin, *i.e.*, provided the uncle relinquished all interest in the property conveyed, resigning it to his brother, who is entitled to take seisin on behalf of his minor son ; but the gift is invalid, if the uncle continue associated with the father in possession. Notwithstanding this doctrine, if a father make a gift during his last sickness of all his property to one child, in exclusion of the others, it is wholly illegal, because in such a state the heirs in general have an inchoate right to his property, and, consequently, such disposition is unauthorized. If he make the gift when in health, the donor acts immorally, and oppressively, and it is sinful in an ancestor to act injuriously towards his heirs. But whether the gift, under such circumstances, is valid, there seems to be some difference of opinion, *Macn. Prec.* p. 226.

Gift to a Minor Donee, the Legal Guardian being Absent.—If a mother make a gift to her infant daughter, who is residing with her, of property which is her own, and by reason of the minority of the daughter, acceptance did not take place on her part, and the property from the same cause continued in the possession of the donor, and if the father was at the time of the gift at a remote distance,* the

* Remote distance means three stages, or three days' journey. One stage means as far as a person may be able to travel at a moderate pace in the shortest day in the year, between morning and the setting of the sun, *Macn., supra.*

gift is valid. The seisin of the mother is equivalent to that of the daughter, and, on her signifying her consent, the gift is complete without the donee's seisin, *Hedaya, Macn. Prec.* p. 206, Cas. ix.

Seisin on Behalf of a Minor by the Brother of his Grandfather.—Such seisin is not sufficient, for the law requires seisin by the donee, except in the case of a gift made by a father to his minor son, and a few other specially excepted instances. According to *Shurhi Viqaya*, “A gift made by a father to his child is perfected by a mere declaration of it.” The gift of a stranger to such child is perfected by his seisin, if he have discretion; or by the seisin of his father, or grandfather, or mother, provided he is residing with her, or even by the seisin of a stranger who has the care of the minor. Such is the doctrine of the *Hedaya* and other authorities; and its meaning is, that if a father make a gift to his minor son, who may not have discretion, *i.e.*, the capacity of distinguishing between what is advantageous for him and the reverse, the gift is complete by the mere declaration of it, and there is no necessity for acceptance, or seisin on the part of the donee. But if a stranger make a gift to a child, such gift will be perfected on the seisin by the donee, if he have discretion; or by seisin made on his behalf by his father, or grandfather, or guardian appointed by them; or failing these persons, by his mother; or by the seisin, on his part, of a stranger, who has the care of his education, and under whose protection he lives. The seisin, therefore, by the grandfather's brother will not be legally sufficient, unless the donee, during his minority, was living under the protection of that relation, *Macn. Prec.* p. 213.

If the grandfather's brother should not surrender possession to the minor until he attained his majority, this will not invalidate the gift, because, in point of fact, the seisin of the grandfather's brother is equivalent to the seisin of the minor, *ib.*

And if at the time of transferring the proprietary right there was a third sharer in the estate in question, it will undoubtedly invalidate the transfer, because it superinduces

the legal objection of definiteness. Unless the share of the donor be separated and parcelled off from the joint property, either previously, or subsequently to the gift, it operates to prevent a legal transfer of proprietary right, *ib.* p. 214.

A first wife executed a deed of gift of her entire estate to a minor whom she had adopted as a son, and whose name she caused to be registered as proprietor of some parts of the estate. She remained in possession, and was ostensible proprietor. She mortgaged the estate in her own name. The gift of those parts of the estate, of which the minor was registered as proprietor, and of which he took *bonâ fide* possession, is valid. The mortgage by the donor in her own name was not legal. Her having done so cannot affect the right of the minor donee, nor in any shape invalidate the gift; for the mortgage cannot be considered as a proof of resumption on the part of the donee, because resumption of a gift is not lawful under such circumstances. Besides, it must be in express terms, and not implied by the donor appropriating the profits, or other similar acts; and it is nowhere laid down that resumption of a gift is of two descriptions, one express, and the other implied, *Macn. Prec.* p. 230.

A special appeal was admitted, to try whether the Judge has decided against the gift in accordance with Mahomedan law or not, the *Moulavie* of the court having stated verbally, to a question put to him, that the usual legal proof, of which the possession is the main feature, being forthcoming, a *buksheesh putra* is not essential to its validity, even when debts are due; and that the gift, therefore, should be held good. Held, that the exposition of the Mahomedan law in the Zillah Court was not as stated by the Judge; that without documentary evidence of property having been disposed of, a claim of having received it in gift cannot hold to bar the right of creditors, but was to the effect that delivery by the donor, and acceptance and possession by the donee, must concur to make it valid. The exposition being approved of by the Kasee, the decision of the Principal Sudder Ameen, who found these essentials to the validity of the gift had been proved, was upheld, 2 *Moore's Cases*, S. D. A. Bomb. 103, 12 May, 1855.

A deed of adoption by a Mussulman, declaring that the adopted son should "succeed to his property and title," was held, on appeal, to be inoperative and void, either as a deed of gift, or a testamentary disposition, no delivery of possession and relinquishment by the donor, or seisin by the donee, having taken place, *Moore's In. Ap.* 245, 5 Feb. 1844, *ante*, pp. 10, 11.

A Mahomedan transferred to his wife all his real and personal property, in lieu of dower, by virtue of a *Hibeh-bil-iwuz*, stipulating that he should continue in possession, *as on the part of his wife*, until his death. The deed, immediately after its execution, was forwarded to the collector for his information, and was attested before him. Held valid, and that the gift was good as against the heirs of the donor, 1 *Dec. S. D. A., N. W. P.*, 199, 23 Nov. 1846.

There is no doubt that when a husband assigns over to his wife by deed all his property, moveable and immoveable, in satisfaction of dower, or in lieu thereof, her right is completely established, and the ownership of the husband is entirely divested, and seisin is not a requisite condition, *Macn. Prec.* 276. Such an assignment is not an absolute gift, in which case seisin would be necessary, but rather resembles a sale, or an exchange, being a gift for a consideration, or *Hibeh-bil-iwuz*, to the validity of which, possession is not essential, *Macn. Ch. v. ante*, p. 187; *ib. Prec.* 217, 221, 276, *note*. If, however, a sale be "imperfect" (*Fasid*), by reason of there being such a condition that either of the parties to a transaction should derive other advantage than such as might arise from the commutation of goods for goods, the rule is, that such imperfect sale confers no right of property on the purchaser until the latter be seised of the property, with consent of the vendor, where the legal defect is cured, and the right of property becomes complete in the purchaser, *Macn.* § 7, *ante*, p. 160; *Baillie's Sale*, 6 *note*. The law officers, both in the lower Court and in the Sudder Dewanny Adawlut, expounded the law as to the curing of the defect of an imperfect sale correctly; but they considered the above transaction imperfect, on account of the stipulation for the possession of the vendor after the execution of the deed,

which was an advantage accruing to him other than that arising from the commutation of goods for goods. The Court decided the case in favour of the wife, on the ground of possession, considering that her possession during the lifetime of her husband was abundantly proved, *i.e.*, although her husband was deputed by her to manage the property on her behalf, he only acted as her agent; and that such a circumstance, to all intents and purposes, can only be regarded as her possession in the light contemplated by the law. "But if the condition of the husband remaining in possession and acting as his wife's agent rendered the sale imperfect, as the law officers considered, and also gave the wife a constructive possession of the property, as held by the Court, the agency clause caused and cured a defect in the transaction at one and the same time, which would seem an anomaly," *Macn. by Sloan*, p. 440.

Accretions in Case of Invalid Gift.—Where a gift made by a donor in favour of a donee to the extent of her own share (being one quarter of the property left by her father) has been declared null and void, by reason of the property being undivided, or on any other ground of invalidity, and it be admitted, on the part of the donee, that from the time of the donor's death he himself and his guardian had possession of the property so given, the profits which accrue from the estate during his own and his guardian's possession, are not considered definite property or identical with the estate itself; and, according to the opinion of Aboo Haneefa, the donee is not accountable to the heirs of the donor for such profits. The two disciples maintain the contrary; but the opinion of Haneefa is best received and most acted on, *Macn. Prec.* p. 239.

Macn. ib. note, endeavours to explain the obscurity of this doctrine by a quotation from the *Hedaya* which he considers may render it more intelligible, but which really seems to have a contrary effect. Thus: "It is to be observed that if a person claim a debt from another of 1,000 *dirms*, and obtain payment of the same, and both parties afterwards agree that the debt was not due, in that case the profit which the claimant may, in the meantime, have acquired by posses-

sion of the money, is lawful to him ; because the *baseness* in this instance is occasioned by invalidity of right ; for this reason, that the debt had been owing in consequence of the demand of the claimant, and the defendant's acknowledgment of it ; and it afterwards appears that this debt is *not* the right of the *claimant*, but of the *other* (namely, the defendant) still, however, the 1,000 *dirms* which the claimant took in satisfaction of his demand, have become his property, as the satisfaction for a claim becomes the property of the claimant, although it be under an invalid right ; and as the *baseness* in this instance is occasioned by the mere *invalidity* of right of property, and not by the absolute non-existence of that right, it consequently cannot operate, nor have any effect with respect to a thing of an *indefinite* nature, such as money, for instance, *Hedaya*, vol. ii. p. 460.

The principle involved in the doctrine is intelligible enough without the explanation, which is, that if a gift should be declared void, the profits that may have accrued between the acceptance of the gift and the declaration of its invalidity, do not become part of the estate, which is the subject of the gift ; and the heirs of the donor, who, in consequence of the invalidity of the gift, would become entitled to it, have no right to the profits received by the donee while he held the gift, but only to the gift itself, without accretion.

When Gift not Hereditary.—An allowance granted by a *Kararnamah*, there being nothing in the said deed to show that it was hereditary, even if it be granted as a compensation for the relinquishment of a claim by the grantee, will cease at the death of the latter, there being no stipulation to the contrary ; the continuance of such an allowance to the widow of the grantee, and subsequently to an adopted son of the grantee, is a voluntary act of the grantor, and does not establish any right in those persons, or either of them, to claim it, Case 12 of 1817, *Mad. Dec.* 167.

SECTION II.

OF BEQUESTS, OR WILLS.

Definition of—Distinction between property acquired by inheritance and by will—Persons competent to make a will—Minor—Wife—Qualification of legatee—Legacy beyond limit to be assented to by heirs—Legacy to an heir invalid—Bequest by married women—On failure of heirs whole estate may be bequeathed—Distinction between property acquired by inheritance and by will—Death-bed acknowledgment of a debt is a legacy—Of the subject of a legacy—Illegal provisions—Alteration in condition of legatee—Different bequests to the same person—Where one of two legatees dies—Abatement in legacies—Verbal and written wills—Retraction of legacy—Revocation of will—Express and implied revocation—Reversion of bequests—Joint legacies—Executors—Joint executors—Legacies precede claims of inheritance—Debts precede legacies.

Definition of Will.—A *Wasiyat*, or will, is an assignment of property by its owner to take effect after his death, *Macn. Prec.* 241.

Distinction between Property Acquired by Inheritance and by Will.—There is this difference between the property which is the subject of inheritance, and that which is the subject of the legacy. The former becomes the property of the heir by the mere operation of law. The latter does not become the property of the legatee, until his consent shall have been obtained, either expressly or impliedly, *Macn. Ch. vi. § 4.*

Persons Competent to make a Will.—Every person able to contract is competent to make a will, *Elb.* 140.

Minor.—A minor cannot make a will, *Elb.* 140.

Wife.—A wife can bequeath her own property without the consent of her husband, *Elb.* 140; *Shek Mahomed v. Shek Imamudin*, 3 *Mad. Jur.* 275, *post.*, p. 219.

Qualification of Legatee.—Legacies are to be made only to strangers, *i.e.*, those who are not heirs, and must be confined to one-third of the estate of the testator left, after paying his funeral charges, and debts, *Elb.* 146.

Legacy Beyond Limit to be Assented to by Heirs.—If agreed to by the heirs, bequests to a larger amount may be upheld in law, *Macn. Ch. vi. § 2*.

Legacy to an Heir Invalid.—A legacy to one of the heirs made without consent of the rest is invalid, *Macn. Ch. vi. § 3*; *Doyne v. Paul*, 5 *Rev. Civ. and Cr. R.* 216; *Abedoonissa Khatoon v. Ameeroonissa Khatoon*; 9 *W. R. Civ. Rul.* 257. *Cal.*

A bequest to a stranger is valid without the consent of the heirs, but not beyond a third of the estate, unless assented to by them after the testator's death. . . . When a man bequeaths his whole estate, having no heirs, the bequest takes effect, and there is no occasion for any assent on the part of the *beit-ool-mal*, or public treasury (though it is the *ultimus hæres*).

A bequest to an heir is not lawful according to "us" without the assent of the other heirs. If it be made to an heir and a stranger, it is valid as to the share of the stranger, and dependent as to the share of the heir on the permission of the other heirs. If permitted by them, it is lawful; and if not permitted by them, it is void, no regard being had to a permission granted in the lifetime of the testator, so that they may afterwards retract. *Baillie Dig. M. L.*, pp. 614, 615.

On Failure of Heirs whole Estate may be Bequeathed.—If the testator has no heirs, he can will away his whole estate, *Elb.* 147.

A will is valid as against an heir if he affixed his signature to it, as a consenting party without undue influence, *Khadejah Beebee v. Suffur Ali*, 4 *W. R. Civ. Rul.* 36. *Cal.*

A *Wasiyat-Namah*, or will, diverting all the property from the next heirs, is illegal, *Sheikh Jumeenooddeen Ahmed v. Meer Hossein Ali*. 2 *W. R. Mis. Ap.* 49.

A Mahomedan cannot devise more than a moiety of his estate to his daughter, *Mahommed Mudun v. Khodezunissa*, 2 *W. R. Civ. Rul.* 181.

A nuncupative will by a Mahomedan of the Sheea sect, bequeathing property less in amount than one-third of his estate, was held valid, and effect was given to the bequest,

Nuwab Amin-ood-Dowlah v. Syud Roshun Ali Khan, 5 *Moore's In. Ap.* 199.

Semble.—Such verbal bequests would have been valid if beyond a third of the testator's estate, provided the heirs concurred in the bequests, *ib.*

Bequest by Married Woman.—Held, that the bequest by a married woman of the whole of her estate to her brother, without the assent of her husband, is invalid, *Shék Mahomed v. Shék Imamudin*, 3 *Mad. Jur.* 275.

Death-bed Gift.—A death-bed gift cannot be set up as having been executed as a deed of sale, in order to defeat the operation of the Mahomedan law of wills, by which a testator is precluded from giving more than one-third of his property by will, *Kumuroonissa Begum v. Mirza Syfoollah Khan*, 5 *W. R. Civ. Rul.* 198. *Cal.*

Death-bed Acknowledgment of Debt is a Legacy.—A gratuitous acknowledgment of debt in favour of an heir made on death-bed must be viewed as a legacy, and must be such as would satisfy all the conditions of a bequest: it does not avail for more than a third of the estate, *Macn. Ch. vi. § 7; Ellb.* 147.

Of the Subject of Legacy.—It is not necessary that the subject of the legacy should exist at the time of making the will. Its existence at the time of the death of the testator is sufficient for its validity, *Macn. Ch. vi. § 8; ib. p.* 242.

Illegal Provisions.—The general validity of a will is not affected by its containing illegal provisions; it will be upheld as far as it may be consistent with law, *Macn. Ch. vi. § 9; ib. p.* 244.

Alteration in the Condition of Legatee.—A person who is not an heir at the time the will is made, but becomes one prior to the testator's death, cannot take under the will, *Macn. Ch. vi. § 10.* For example, suppose the testator has one son as his sole heir when making a will in favour of his son's son, but the son dies before the testator: the son's son cannot take under the will as son, as on his death he becomes the heir of his grandfather, the testator, *ib. p.* 248.

But a person being an heir at the time of the execution of the will, but becoming excluded previously to the death of

the testator, takes the legacy, *Macn.* Ch. vi. § 10. For example, when the testator's sole heir and legatee was his son's son, who, however, becomes afterwards excluded from the inheritance by the birth of a son to the testator before his death, such legatee can take under the will.

Different Bequests to the same Person.—Where a legacy is bequeathed, and subsequently a larger legacy is given to the same individual, the latter will take effect, but if the bequests were reversed, the smaller will take effect, *Macn.* Ch. vi. § 13.

Joint Legatees—Where One of Two Legatees Dies.—Where a legacy is left to two persons indiscriminately, if one of them die before the legacy is payable, the whole will go to the survivor; but if half was left to each of them, the survivor will get only half, and the remaining moiety will devolve on the heirs of the testator. The same rule will hold in the case of an heir and a stranger being left joint legatees, *Macn.* Ch. vi. § 14.

Abatement in Legacies.—If the amount of several legacies left by the testator exceed the limit allowed by law, a proportionate abatement must be made in all the legacies, if the heirs refuse confirmation, *Macn.* Ch. vi. § 12.

Verbal and Written Wills.—There is no preference shown to a written over a nuncupative will, and they are entitled to equal weight, whether the property disposed of be real, or personal, *Macn.* Ch. vi. § 1. But where the testator does not die soon after making the will, a verbal one will be inoperative, as he might have subsequently altered his intention, *Elb.* 142.

Retraction of Legacy.—If a man bequeath property to one person, and subsequently make a bequest of the same property to another individual, the first bequest is annulled; so also if he sell, or give the legacy to any other individual, even though it may have reverted to his possession before his death, as these acts amount to a retraction of the legacy, *Macn.* Ch. vi. § 11.

Revocation of Will.—A will is in its very nature a revocable instrument. Revocation may be either express or implied, *Elb.* 144, 145.

Express and Implied Revocation.—It is express where the will is destroyed, or is superseded by a codicil; implied where the testator increases or diminishes the legacy, or alienates it to others subsequent to the will, *Elb.* 145.

Reversion, or Lapsing of Bequests.—A bequest made to a person without provision for its descent to his heirs, reverts, on his death before the testator, to the latter, *Elb.* 148.

Executors.—Formerly a Mahomedan could not employ a person of a different persuasion to be his executor. Such appointment was liable to be annulled by the ruling power, *ib.* But this restriction is now removed, *Elb.* 29. A Christian or a Hindoo may legally be the executor of a Mahomedan, *ib.* 4 *S. D. A.*, pp. 55, 303. Where there is no executor appointed, the father or the grandfather may act as executor, or in their default their executors, *Macn.* Ch. vi. § 15.

Executors having once accepted, cannot subsequently decline the trust, *Macn.* Ch. vi. § 17.

Joint Executors.—Where there are two executors, it is not competent to one of them to act singly, except in cases of necessity, or for the certain benefit of the estate, *Macn.* Ch. vi. § 18.

Legacies Precede Claims of Inheritance.—The payment of legacies to a legal amount precedes the satisfaction of claims of inheritance, *Macn.* Ch. vi. § 5.

Legacies are to be paid out of a third of what property remains after payment of funeral expenses and debts, unless the heirs allowed them beyond a third. The preference of a legatee to an heir is only when the legacy is of something specific, for if it be a confused legacy, as the bequest of a third or a fourth, it has no right to preference; nay, the legatee in that kind of legacy is a partner with the heirs, and his interest rises or falls with any increase or diminution of the testator's estate, *Bail. M. L.* 684.

Debts Precede Legacies.—All the debts due by the testator must be liquidated before the legacies can be claimed, *Macn.* Ch. vi. § 6.

CHAPTER IV.

ENDOWMENTS, OR WUQF.

Definition—Wuqf imports property in which proprietary right has been relinquished—Wuqf must be specially so appropriated—Test of being bonâ fide or nominal—Death-bed endowment—Grant of to a person not in existence—Undefined property endowable—Not transferable—Royal grants are of two descriptions—Altangha—Alienation of wuqf lands—Mortgage—Burying-ground—Custom permitting sale—Not exchangeable—Not liable to claims of inheritance—Dedication of lands for a ceremony—Appointment of superintendent—Executor—Consignment or bequest of trust to son—A female cannot manage spiritual affairs—A wuqf may appoint himself mutawalli—Joint superintendent—Removal of superintendent—Profits—Not to be farmed out—Grant of leases of, &c.—Endowments for descendants—A deed not necessary—Nor delivery—Where time of dedication taking effect postponed until after death of testator—The assignment of lands for is good only for the extent of the proprietor's interest—Effect to be given to donor's intention—Co-sharers—Escheat—Limitation.

Definition.—An endowment is defined to be the appropriation of property to service of God, *Macn. Ch. x. § 1.*

Wuqf Imports Property in which Proprietary Right is Relinquished.—The term *wuqf* imports property in which proprietary right is relinquished, and which is consecrated in such a manner to the service of God, that it may be of benefit to man. Held, therefore, that the provision made for the reading of the Koran at, and lighting of the tomb of the testator, cannot be looked upon as creating *wuqf* property, *Dec., S. D. A. 235, 21 Feb. 1857.*

The thing appropriated must be, at the time of the appropriation, the property of the appropriator, *1 S. D. A. Ben. Rep. 17.*

Grants to an individual in his own right, and for the purpose of furnishing him the means of subsistence, do not constitute *wuqf*, or endowments, *Bibee Kuneez Fatima v. Bibee Saheba Jan, 8 W. R. Civ. Rul. 313. Cal.*

Wuqf must be Specially so Appropriated.—No property can be considered *wuqf* unless it can be satisfactorily established that it had been specially so appropriated, *Macn.* 338, note; *Dec. S. D. A.* 69; 20 Jan. 1853.

It is not necessary, in order to constitute *wuqf*, or endowment to charitable uses, that the term *wuqf* be used in the grant; if, from the general tenor of the grant, such tenure can be inferred, *Jewun Doss Sahoo v. Shañ Kubeer-ood-deen*, 2 *Moore's In. Ap.* 890; 2 *S. D. A. Ben. Rep.* 110.

Test of being Bonâ fide or Nominal.—One test of a bonâ fide, or nominal endowment, is to see how the founder himself treated the property, and how the descendants have since treated it, *Gunga Narain Sircar v. Brindabun Chunder Kur Chowdhry*, 3 *W. R. Civ. Rul.* 142. *Cal.*

Death-bed Endowment.—An endowment made on death-bed is viewed as a legacy, and takes effect to the extent of a third of the endower's property, *Macn.* Ch. x. § 2.

Grant of to a Person not in Existence.—In case of the grant of an endowment to one, with reversion to the poor, it is not necessary that the grantees specified shall be in existence at the time; for instance, if the grant be made in the name of the children of A, with reversion to the poor, and A should prove to have no children, the grant will, nevertheless, be valid, and the profits of the endowment will be distributed amongst the poor, *Macn.* Ch. x. § 4.

• **Undefined Property Endowable.**—Undefined property is a fit subject of endowment, *ib.* § 2.

Royal Grants are of Two Descriptions.—Royal grants are of two descriptions, *Altumgha* and *Wuqf*. The former are personal grants, and therefore form heritable property; the latter are charitable and religious endowments, with respect to which no claims of inheritance are admissible, *Macn. Prec.* 329.

Not Transferable or Alienable.—An endowment is not a fit subject of sale, gift, or inheritance, 6 *S. D. A. Ben. R.* 32. It may, however, be sold by the judicial authority* for

* The superintendence of all endowments is specially vested in the Board of Revenue by Reg. VII. of 1817.

indispensable purposes, such as the execution of necessary repairs of buildings forming part of the endowment, *Macn.* Ch. x. § 3; because the preservation of the buildings is in all cases of an endowment a matter of indispensable necessity, *Macn. Prec.* 328.

Where certain *Inaam* land, granted for the service of a Musjid, was attached in satisfaction of a decree obtained by a mortgagee, of the property, against the descendants of the original grantee, who had mortgaged it to him. It was held, that by the Mahomedan law the mortgage was illegal and void, as land appropriated to religious purposes could not be sold, or mortgaged by any of the descendants of the original proprietor, and the Court agreed that the attachment should be waived, *Sil. Rep.* 204, *D. A. Bomb.*

The alienation, temporary or absolute, by mortgage or otherwise, of *wuqf* lands, though for the repair or other benefit of the endowment, is illegal, 7 *S. D. A. Beng. Rep.* 268, 19 July, 1846.

Wuqf lands are not alienable, 2 *S. D. A., Beng. R.* 110, 17 Mar. 1814; 3 *ib.* 407, 24 Aug. 1824; 2 *Moore's In. Ap.* 390, 9 Dec. 1840; 5 *S. D. A. Beng. B.* 87, 17 Feb. 1831.

The term *Altumgha* or *Altumgha Inaam*, in a royal grant, does not of itself convey an absolute proprietary right to the grantee, where, from the general tenor of the grant it is to be inferred that *wuqf*, or endowment to religious and charitable uses, was intended, and property so endowed cannot be alienated by the grantee, or his representative, *Jewan Doss Suhoo v. Shah Kubeer-ood-deen*, 2 *Moore's In. Ap.* 390.

The *Sejjadeh Nishin*, or superior of *Wuqf*, property has no power of alienating it. His duty is merely to administer the affairs of the property, 6 *S. D. A. Beng. B. Sum. Cas.* 40, 21 Nov. 1842.

Makbarah, or burying-ground, is *wuqf*, and consequently cannot be alienated, 1 *Dec. S. D. A., N. W. P.* 250, 15 Dec. 1846; *Dec. S. D. A. Ben.* 1218, 1 July, 1858. See *post*.

It was ruled, on the authority of *Macnaghten's Prec.* p. 328, that, generally speaking, "The gift, or sale of en-

dowed lands is illegal ;” but, “if the profits of the lands are not sufficient to cover the expenses of necessary repairs, the trustee is at liberty to dispose of such portions of the lands as may enable him to effect this purpose, because the preservation of buildings is in all cases of endowment a matter of indispensable necessity,” 8 *Dec. S. D. A., N. W. P.* 433.

Custom Permitting Sale.—Although property assigned for pious purposes cannot be sold, yet a custom permitting such a sale would be held good by the Court, 1 *Borr. S. D. A., Bomb. R.* 3, 9 Sept. 1811.

Wuqf shops attached to a mosque are not necessarily wuqf ; there must be a special endowment, 8 *S. D. A., N. W. P.* 433, 1853. .

Where ryoti holdings of wuqf lands have been habitually sold by the ryoti under former Mutawallis, such right of transfer must be respected by their successors until cancelled by an action at law, 7 *S. D. A., Ben. Rep.* 311.

Endowments not Exchangeable.—The property endowed cannot be exchanged for another, unless a stipulation has been made to that effect by the appropriator, or unless circumstances should render it impracticable to retain possession of the particular property, or unless such exchange be for the benefit of the endowment, and be approved of by the ruling power, *Macn. Ch. x. § 7* ; nor should endowed lands be farmed out for less than their value, *Macn. Ch. x. § 7*.

Not Liable to Claim of Inheritance.—Property belonging to religious endowments is not liable to claims of inheritance, 6 *S. D. A., Beng. R.* 32.

Dedication of Land for a Cemetery.—A general dedication of land for the purpose of a cemetery establishes wuqf, and excepts the same from descent to the heirs, 5 *S. D. A., Ben. Rep.* 136, 30 July, 1831.

But the existence of tombs on land, unless the owner had consecrated it, does not bar partition, except as to the actual spot covered by the tombs, *ib.*

Appointment of Superintendent.—The superintendent of an endowment may on his death-bed appoint a successor,

subject to the confirmation of the ruling power, provided the grantor has made no provision for the appointment of the successor, *Macn.* Ch. x. § 6.

Where the power of appointment of superintendent to an endowment is not provided for by the deed of endowment, it must be governed by the ordinary rule, which allows a superintendent, on his death-bed, to appoint a successor, though the appropriator has not given him a general permission, *Dec., S. D. A., Ben.* 640.

Executor.—On the death of a person appropriating property to pious uses, the power of appointing the superintendent of such property is vested in the executor of the proprietor; or, should he leave no executor, then in the ruling power, 1 *S. D. A., Ben. R.* 17.

Consignment or Bequest of Trust to Sons.—The superintendent may legally consign, or bequeath the trust to his sons on his death-bed, without any express power to that effect. But a consignment made during health is invalid, unless he has obtained the superintendence with such power, *ib.*

A Female may act as *Mutawalli*, and discharge the duties of the office by proxy, 5 *S. D. A.*, 363 *Beng. Rep.*, 25 Nov. 1839; 6 *ib.* 110, 22 Sept. 1836.

The Office of Sajjadeh Nishin cannot be held by a female, 6 *S. D. A., Beng. R.* 22.

Females cannot Manage the Spiritual Affairs of an Endowment.—They cannot hold the office of superintendent of the spiritual affairs of the endowment; they can superintend its temporal affairs, *Elb.* 63.

The plaintiff who had been ejected by the revenue authorities from the office of *Mutawalli* of a religious endowment, sued for restoration to such office in virtue of a *Tauliyat nameh* executed by the *Mutawalli*, who had himself been appointed under a testamentary trust, with a power to nominate his successor. The Court being of opinion that the plaintiff had never been in possession of the trust under the original deed of nomination, and appointment in his favour, and that the personal management of the establishment, and possession of the trust had not been established, dismissed

the claim, but recorded their opinion that, subject to the decision of Government, the plaintiff had the best claim to the trusteeship, 6 *S. D. A.*, *Ben. Rep.* 110.

The question of the validity of the appointment of the appellant to the trusteeship, and of the extent of interference which can be legally exercised by the revenue authorities, under *Reg.* xix. of 1810, in regard to such appointments, were not positively ruled by the judgment of the Court, but it may be assumed that the appointment of a successor by a *Mutawalli*, himself legally appointed, and duly empowered by the original deed of appropriation to make such appointment, and faithfully and efficiently discharging his trust, would be a legal and valid appointment, and that the trustee so appointed cannot be removed by the ruling power without proof, or strong presumption of corruption, or incompetency, See *Macn.* § 5, 6, 8, 10 ; *ante*, pp. 226, 227, 231, 239 ; and *Reg.* xix. of 1810 ; *Beng. Code*, *Morley*.

A *wuqf* may appoint himself *Mutawalli*, and may reserve the profits of part of the consecrated land for his own use and his descendants', 1 *Fulton* 345, *Sup. Ct. Cal.* Mar. 1838.

Joint Superintendents.—Where an endower appoints two joint superintendents, neither can act independently of the other. If he retains a moiety of the superintendence, and appoints a co-superintendent with himself, he may then act of his own accord, *Macn.* Ch. x. § 9.

Removal of Superintendent.—The superintendent appointed by the grantor cannot be removed unless on proof of misconduct, nor can the grantor himself remove such person unless such power is specially reserved to him at the time of making the appropriation, *Macn.* Ch. x. § 5.

Where the trust is bequeathed to the superintendent's sons, the ruling power may remove them on proof of misconduct, and appoint a person of integrity in their stead, 1 *S. D. A.*, *Beng. R.* 17.

A *Mutawalli* has power to remove the *Mouzzin* and other servants of a mosque for neglect of the duties of the office to which they were appointed, See *S. D. A.*, *Ben.* 193, 27 April, 1854.

A *Mutawalli* is liable to removal for misappropriation of the property belonging to the wuqf estate, *Dec. S. D. A. Ben.* 285.

Duties of Superintendent.—It is incumbent on the superintendent to apply the profits of the endowed lands, in the first instance, to defray the expense of repairing the buildings of the institution, the surplus being applied for other purposes of the endowment.

Not to be Farmed Out.—Endowed property cannot be farmed out for more than three years, except for the manifest advantage of the endowment, *Macn. Ch. x. § 7.*

Grant of Leases of Endowment.—If an endowment is wholly wuqf, *i.e.*, if all the profits arising therefrom are devoted to religious purposes, a *Mutawalli* is not competent to grant a lease extending beyond the period of his own life; but if the office of *Mutawalli* be hereditary, and he have a beneficial interest in the endowed property, such property must be considered as an hereditary estate, burdened with certain trusts, the proprietary right of which is vested in the *Mutawalli* and his heirs, and in which case he is as competent as *Zemindars* to grant leases, even in perpetuity, *Dec. S. D. A., Ben.* 586, 31 March, 1858.

In 4 *Sel. Rep.* 151 (8 May, 1826) it was held, that a *Shewait* had no authority to grant a lease beyond the period of his own life, but in that case the whole of the profits were devoted to a religious purpose, *ib., note.*

Grant of Putnee thereof.—The Court refused to enforce against the manager of certain endowed property a contract for specific performance (the contract being for the grant of a *putnee* lease of a portion of the said property) on the ground of its being doubtful whether it is competent to the manager of endowed property to grant *putnee* thereof, *Motee Doss v. Mudhoo Soodun Chowdhry*, 1 *W. R. Civ. Rul.* 4. *Cal.*

Grant of Perpetual Lease by Trustees.—The trustees of an endowment cannot create a valid *mourosee* tenure at a fixed rent, by making a lease of any portion of the *wuqf* property, *Shoojah Ali v. Zumeerooddeen*, 5 *W. R. Civ. Rul.* 158.

Leases by Kadims.—Unless endowed property descends

to the heirs of a deceased *Kadim*, they can have no right to manage, or interfere with the property. If a *Kadim* has only a life interest, any lease given by him will be in force only during his lifetime, and cannot continue without the consent of the succeeding *Kadim*, or perhaps of the *Mutawalli*, if he has any special right to confirm leases, *Sujawut Ali v. Busheerooddeen*, 2 *W. R. Civ. Rul.* 189. *Cal.*

Endowments for Descendants.—The profits of an endowment for the support of descendants, *i.e.*, of an *Altumgha* grant, should be divided equally between them, without distinction of sex, *Macn.* 329 ; *Elb.* 63.

Deed not Necessary.—Documentary evidence not necessary to establish an endowment, *Muddun Lal v. Sreemutty Komul Bibee*, 8 *W. R. Civ. Rul.* 42.

A valid endowment may be made verbally without deed, and though the witnesses to the deed depose vaguely, yet their evidence (corroborated by circumstances) is legally sufficient, 5 *S. D. A.* 87, 17 Feb. 1831 ; 1 *Fulton Rep.* 345, *Sup. Ct. Cal.*

Nor Delivery.—Wuqf is valid without delivery, and is created by a mere verbal declaration of interest, 1 *Fulton Sup. Ct. Cal.* Mar. 1838.

Where Time of Dedication taking Effect Postponed until after the Death of Testator—Will.—Where the instrument made an immediate dedication of more than a third of the donor's property to the service of the Deity, reserving a life interest to the donor, it is wuqf and valid, 1 *Fulton Rep.* 345, *Sup. Ct. Cal.* But if the time of the dedication taking effect be postponed until after the death of the testator, the instrument operates as a will, and is only valid to the extent of one-third of the donor's property, *ib.* See Bequest, *ante*, p. 217.

The term *altumgha*, or *altumgha Inaam*, in royal grant does not of itself convey an absolute proprietary right to the grantee, when, from the general tenor of the grant, it is to be inferred that a wuqf, or endowment to religious and charitable uses, was intended, and property so endowed cannot be alienated by the grantee, or his representatives, *Dewan Doss Baboo v. Shah Kubcer-ood-deen*, 2 *Moore's Ind.* Ap. 390.

The use of the term *Inaam* in a royal grant, does not necessarily show that the property specified is conveyed in absolute proprietary right, if from the general tenor of the instrument it may be inferred that wuqf was intended. In such cases reference should be had to the custom of the country, and the question should be decided by the sense attached by common usage to the expressions, 3 *S. D. A.*, *Ben. Rep.* 407.

It is a fundamental principle of Mahomedan law, that in every ambiguous expression of a person in conveying a right to another, reference should be had first to the custom of the country, and on failure of that, to the intention of the grantor as stated by himself. As respects wuqf, this is especially recommended in the *Futawa Allumgeeree*, *Morley*. The term *altumgha*, or *altumga Inaam*, does not of itself convey an absolute proprietary right to the grantee, if, from the general tenor of the royal grant, it is to be inferred that wuqf was intended, 2 *Moore's In. Ap.* 390, *ante*, 229.

The Assignment of Lands for an Endowment is Good only for the Extent of the Proprietor's Interest.—On a claim by A (a female), as trustee of a religious establishment, against B, and C, for possession of certain lands, it appeared that the lands had been assigned for an endowment, but the person who assigned them, and settled the trusteeship on the claimant, was proprietor of an eleven-anna share of them only; the endowment was held good for that proportion only, and possession was adjudged to the trustee, 1 *S. D. A. Ben. Rep.* 214.

An assignment for a pious endowment of the whole of an estate, of which the endower is entitled only to a share, is void, even as to his share, according to the doctrine of Ibram Mahommed, such share being at the time undefined. But according to Abu Yusuf, and a whole series of *Fatawa* which coincide with him, the assignment of so much of the estate as was the legal share of the endower is valid, and the Court decided according to this latter opinion, *ib.*

Effect to be given to Donor's Intention.—Effect should be given to the spirit of the intention of the grantor, except

when it may be manifestly detrimental to the interests of the endowment, *Macn. Prin., ib.*

Exception.—If it be stipulated that the lands shall not be let out to farm for more than a year, and a tenant cannot be obtained for so short a period, the ruling power may make a lease for a longer term; so where the excess of profits is to be distributed amongst persons who beg for it in the mosque, it may be given in other places and amongst the necessitous, though not beggars; so if rations of food are to be served out to the necessitous, the allowance may be made in money; so the ruling authority has power to increase salaries of officers, where merited, *Macn. Prin., Ch. x. § 8.*

Co-Sharers.—The right of one of several co-sharers in an endowment to receive possession of the land from which he has been ousted by the other co-sharers, is a personal one, and does not descend to his heirs. A decree for that purpose obtained by him, if not executed by him in his lifetime, will become infructuous after his death. His widow, however, can recover in a regular suit, whatever sums he paid out of his own funds for keeping up the service of the idols, *Radha Jeebun Moostofee v. Tara Monee Dossee, 3 W. R., Mis. Ap. 25.*

An endowment for charitable and religious purposes, being a perpetual endowment, it is the duty of the Government to preserve its application, *Jewan Doss Sahoo v. Shah Kubeerood-dee, 2 Moore's In. Ap. 390.*

An endowment for charitable, and public purposes, being a perpetual endowment, it is, according to the provisions of *Reg. xix. of 1810, of Bengal*, the duty of the Government to preserve its application; and being excepted by *sec. 2 of Reg. ii. of 1805*, from the general operation of the Regulation of Limitation, no suit for its recovery is barred until at least the officer entitled to administer it has been in possession of his office for twelve years, *ib.*

Limitation.—Where the mosque has been allowed, from neglect, to disappear, and the ground was waste, and had not been made use of by the Mahommedan population, for religious purposes, for twelve years preceding the institution of the

action brought by the Mahommedans of Delhi, to recover the ground taken possession of by the Government, it was held, that the ground must be considered to have escheated to the Government, whose agent, under the authority of sec. 4 of *Reg. xix. 1810*, was fully competent to take possession of it, 8 *Dec. S. D. A., N. W. P.* 679.

CHAPTER V.

THE RELATIONS OF LIFE.

SECTION I.—OF MARRIAGE.

SECTION II.—OF DOWER.

SECTION III.—OF DIVORCE.

SECTION IV.—OF PARENTAGE.

SECTION V.—OF MINORITY.

SECTION VI.—OF GUARDIANSHIP.

I.—OF MARRIAGE.

Social position of Mahommedan women—Definition of marriage—Essentials of—Proposal and consent—How contracted—Conditions of—Witnesses—Objections to them—Presumption of marriage—Time at which they should be present—Marriages with conditions—Equality—Its effect—Husband entitled to the possession of the person of his wife—Liable to damages for her detention—Restitution of conjugal rights—Husband and wife in law separate persons—She may purchase property with her dower—She may execute a lease—Difference between Shadi and Nicka marriages—Impediments to marriage—Consanguinity—Affinity—Fosterage—Freemen and slaves—Religion—Previous marriage—Minors—Who may consent on part of minors—Guardians—Lunatic—Consent of where necessary to marriage of a woman who has attained puberty—Change of sect—Breach of promise of marriage—Limitation—Dissolution of marriage contract by death—Rights of wife of banished husband.

Social Position of Mahommedan Women.—Amongst Mahommedans the social position of women is very low indeed; their parents and guardians having the power of disposing of them in marriage without consulting either their feelings, or predilections; not only is polygamy permitted amongst them—a freeman being allowed four wives, and a slave two, although a woman is allowed but one husband

—but they are allowed promiscuous intercourse with their female slaves, whose children, under certain circumstances, are considered legitimate, see *ante*, p. 10 *et seq.* The greatest facilities are afforded to both parties to relieve themselves from the chains of marriage, and to contract new ones. The husband can at his own will and pleasure divorce his wife, and replace her by another; she, too, may purchase a divorce from him, should the union prove distasteful to her, and marry again, the Prophet declaring that “there is no sin in a wife delivering herself from the power of her husband by giving property in lieu of herself, and there is no sin in the husband receiving such property.”

Definition.—Marriage is defined to be a contract founded on the intention of legalizing generation, *Macn.* ch. vii. § 1.

Essentials of Marriage.—Proposal and consent are essential to a contract of marriage, *Macn.* ch. vii. § 2. The consent of the woman is a condition, when she has arrived at puberty, whether she be a virgin, or not, so that a woman cannot be compelled by her guardian to marry, *Bail. Dig. M. L.* 10. The proposal and acceptance must be both expressed at one meeting, *ib.*

And the acceptance must conform to the declaration, or proposal, *ib.* § 11.

A proposal may be made by means of agency, or by letter, provided there are witnesses to the receipt of the message, or letter, and to the consent on the part of the person to whom it was addressed, *Macn. ib.* ch. vii. § 6.

How Contracted.—Marriage is contracted by spoken words, or in case of dumb persons, by signs. But it is not contracted by *taatee*, or mutual surrender,* nor by writing between parties who are present, *Bail. Dig. M. L.* 14, 15.

Conditions of Marriage.—The conditions are discretion, or understanding, puberty, and freedom of the contracting parties. In the absence of the first condition, the contract of marriage is void *ab initio*. In the absence of the two latter conditions the contract is voidable, except upon the consent of the guardians, or masters of the contracting

* A mode of effecting sale.

parties. It is also a condition that there should be no legal incapacity on the part of the woman; that each party should know the agreement of the other; that there should be witnesses to the contract, and that the proposal and acceptance should be made at the same time and place, *Macn.* ch. vii. § 3.

Witnesses.—The most essential of the formalities required to make the contract of marriage valid, is the presence of witnesses. The Prophet has declared, that “it is not a marriage, unless there are witnesses.” The witnesses should be two in number, and their qualifications should be four, viz. freedom, discretion, puberty, and profession of Mahomedan faith, *Macn. Prin.* ch. vii. § 4.

Objections to them.—Objections as to character and relation do not apply to witnesses to a contract of marriage, as they do in other contracts, *ib.* § 5.

Presumption of Marriage.—Marriage will be presumed in case of proved continual cohabitation without the testimony of witnesses; but the presence of witnesses is nevertheless requisite at all nuptials, *ib.* § 13.

Time at which they should be Present.—They should be present at the time of the declaration and acceptance, not at the time of the allowance of the contract, *Bail. Dig. M. L.* 10.

Marriages with Conditions.—When an illegal condition is annexed to a marriage, the contract is not cancelled by it, but the condition itself is inoperative, leaving the marriage unaffected; contrary to the case of a marriage dependent upon a condition which is not valid, *Bail. Dig. M. L.* 19.

A contract made by a man with his first wife, not to marry a second wife, is not illegal; and an action may be sustained if damages can be proved, 1 *Fulton*, 361, *Sup. Ct. Cal.*, 16 May, 1838.

Equality.—Husbands should be the equals of their wives. But it is not required that the wives should be the equals of their husbands. So, where a woman marries a man better than herself, a guardian cannot separate them, for he is not disgraced by having subject to him one who is not his equal, *Bail. Dig. M. L.* 62. A *nika* marriage between a man and woman of inferior station is valid, and the legiti-

macy of such marriage was established in *Wise v. Sanduloonissa Chowdranee*, 11 *Moore's In. Ap.* 177.

Equality has reference to lineage or descent; to the *Islam* of paternal ancestors, *i.e.*, one who himself has embraced the faith, and whose father was not a *Moslem*, is not an equal of one who had one paternal ancestor a *Moslem*; to freedom, *i.e.*, a slave is not an equal of a free woman; to property, *i.e.*, he should possess enough to pay the dower, and provide for the maintenance of the wife; to piety and virtue, *i.e.*, a profligate is not an equal of a good woman; to trade, or business, *i.e.*, a professor of low trades, as a horse-dealer, cupper, weaver, &c., are not equals of perfumers, bankers, &c. Beauty is not taken into account as regards equality, *Bail. Dig. M. L.* 62–67.

A marriage by a woman to one who is not her equal is valid. Her guardians, however, may object, *ib.* 67.

Its Effect.—The civil effects of a contract of marriage are to legalize connubial intercourse; to place the wife under the dominion of the husband, to confer on her the right of dower, maintenance,* and habitation, and to create between the parties prohibited degrees of relation, and reciprocal, rights of inheritance, *Macn.* Ch. vii. § 7. To enforce equality of behaviour towards all his wives on the part of the husband, and obedience on the part of the wife, and to invest the husband with a power of correction in cases of disobedience, *ib.*

The wife is, in practice, entirely dependent on her husband, and subject to his control. He is bound to maintain her while the coverture lasts; and in the case of divorce, until the term of probation has expired. The term of probation is four months and ten days, called *iddut*, during which the condition of coverture is not entirely extinguished. Thus, according to some authorities, the wife is entitled to maintenance, and forbidden to re-marry until its expiration. Should her husband die in the interval, she will inherit from him, and she ranks also amongst the heirs of her

* This right is expressly recognized, so much so, that if the husband be absent, and have not made any provision for the wife, the law will cause it to be made out of his property; and in case of divorce, the wife is entitled to maintenance during the period of her probation, *Macn. Prin.* 5, note.

parents, brothers, and other relations, though, in general, she is entitled to but half the share of a male standing in the same degree of proximity.

Husband Entitled to Possession of Person of Wife.—A husband may recover the person of his wife in a civil action, 5 *S. D. A.*, *Ben. Rep.* 200, 5 May, 1832. For a wife has no right to separate herself from her husband, unless under a divorce, *Morley*. •

A second marriage of a woman during her first husband's life, and without having been divorced by him, is no bar to the recovery of her person by the first husband in a civil action, notwithstanding her unwillingness to return to him, 7 *S. D. A.*, *Ben. Rep.* 27, 20 April, 1841.

The plaintiff sued for recovery of his wife, who had borne him two children, and who having from illness returned for a time to her parents' house, had been bestowed by them upon another man in marriage; and she not only refused to return to the plaintiff, but the second man declined to give her up. The Court ordered the wife to return, and assessed the damages at Rs.50 in case she refused. The *Sudder D. A.*, on appeal, held, that the second marriage, during the lifetime of the plaintiff, without divorce, was a nullity, and that the action, notwithstanding the wife's unwillingness to return to the plaintiff, was maintainable. Held, also, that the lower Court should have simply awarded to the plaintiff possession of the person of his wife, irrespective of her wishes, *Dec. S. D. A.*, *Ben.* 465, 25 Mar. 1857.

Liable to Damages for her Detention.—A Mussulman, lawfully married to a girl who has attained puberty, can maintain a suit for damages against the father of the girl, and against an alleged husband of the girl, for wrongfully persuading her to remain absent from the plaintiff's society, and for detaining her away from him, *Mahomed Ibrahim bin Mahomed Syed Purkar v. Goolam Ahmed bin Mahomed Syed Roghay*, 1 *H. C. R. Bomb.* 236.

Restitution of Conjugal Rights.—A Mahomedan husband may institute a suit in the civil Courts of India to enforce his marital rights, by compelling his wife, against her will, to return to cohabitation; and such suit must, under

the imperative words of sec. 15 *Reg.* iv. of 1793, and the nature of the thing, be determined according to the principles of the law, *Moonshee Buzloor Ruheem v. Shumsoon Nissa Begum*, 8 *W. R. Pr. Co.* 3. *Cal.*

If the wife raise a defence of cruelty, she must prove violence of such a character as to endanger, or raise a reasonable apprehension of danger, to her personal health or safety, *ib.*

Quære.—If, under the present procedure, the disobedience of a wife to comply with the order of the Court to return to cohabitation can be enforced by giving her over bodily to her husband, such disobedience would seem to fall within sec. 200 of the *Code*, and to be enforceable only by imprisonment, or attachment of property, or both, *ib.*

A suit for restitution of conjugal rights should not decree possession of the person of the wife, but should declare the husband entitled to his conjugal rights, and order the wife to return to his protection, *Koobur Khansama v. Jan Kansama*, 8 *W. R. Civ. Rul.* 467. *Cal.*

Husband and Wife in Law Separate Persons.—In point of law there is no one-ness between the husband and wife, as in the Hindoo law (see *Grady on the Hindoo Law of Inheritance*), they being regarded as separate persons, as we have seen, *ante*, p. 8. The wife may possess property in her own exclusive right.

She may Purchase Property with her Dower.—She may, except with any fraudulent intent, purchase property, as her own during the life of her husband, with money given her by him on account of dower, *Shaikh Nasoo v. Mahatal Beebee*, 4 *W. R. Civ. Rul.* 7. *Cal.*

Execute a Lease.—She may execute a lease, which may endure beyond her lifetime, of property of which she is one of several tenants in common, *Nichhábhái Pragji v. Isse Khán*, 2 *H. C. R. Bomb.* 313.

Shadi and Nicka Marriages.—There is no difference as to the legal position of a *Shadi*, or first wife, and a *Nicka*, or subsequent wife. The offspring of both marriages inherit alike, *S. A., Letter to Board of Rev., dated 21 August, 1817, on the opinion of Kasee-ul-Khusat.*

Impediments to Marriage.—The Mahommedans recognize six impediments to marriage, namely, consanguinity, affinity, fosterage, religion, slavery, and previous marriage.

Consanguinity.—Those excluded by consanguinity are a man's mother, grandmother, daughter, grand-daughter, sister, niece, aunt, *Macn. Prin., M. L. Ch. vii. § 9.*

Affinity.—Nor his mother-in-law, step-mother, his step-grandmother, step-daughter, daughter-in-law, step-granddaughter, grand-daughter-in-law; nor can a man be married at the same time to any two women, who stand in such a degree of relation to each other as that, if one of them had been a male they could have intermarried, *Macn. Ch. vii. § 10.* A man may not marry his wife's sister during the wife's life, unless she be divorced, *ib. Prec. Cas. x.*

Fosterage.—A man may not marry his foster-mother, or foster-sister, unless the foster-brother and sister were nursed by the same foster-mother at intervals widely separated. But a man may marry the mother of his foster-sister, or the foster-mother of his sister.

Freemen and Slaves.—Marriage cannot be contracted with a person who is the slave of the party, but the union of a freeman with a slave, not being his property, with the consent of the master of such slave, is admissible, provided he be not already married to a free woman. But slavery is now abolished, *ante, p. 6.* *Macn. Prin. Ch. vii. § 11.*

Religion.—Mahommedans cannot marry any one who does not believe in one God, *ib. § 12.* See Act xxi. of 1850.

Previous Marriage.—A freeman can have but four wives at the same time, and a slave but two, *ante, p. 233.* A woman can have but one husband at the same time. If she is divorced she cannot contract a second marriage until her iddut, or term of probation, has expired, *i.e.,* for a period of four months and ten days.

These being the restrictions upon marriage, it follows that all persons of full age, and sound understanding are capable of contracting a marriage.

Minors may contract marriage with the consent of their guardians. If such consent was not obtained previous to the

marriage it may be subsequently given, and the effect will be to confirm the contract.

Who may contract on behalf of Minors.—The father, or grandfather may contract a valid and binding marriage on behalf of an infant. Where there is no paternal guardian the maternal kindred may dispose of an infant in marriage, and in default of maternal guardians the Government may supply their place, *Macn.*, Ch. vii. § 19.

Guardians may dispose of infants in marriage; but they have the option on coming of age of annulling the contract unless it had been made by a father or grandfather, in which case it is valid and binding, and the infant has not the option of annulling it on attaining his maturity, *Macn.*, Ch. vii. § 18. Delay on the part of the minor will be construed into acquiescence, *Macn.*, *ib.*

Guardians have the power, before the birth of issue, of setting aside a marriage made by a woman of full age if the union be unequal. So, the birth of issue will defeat their right to set aside the marriage of a female minor entered into without their consent *ib.*, § 17.

Consent by one guardian binds himself and others more remote, but a guardian superior to him who gave his consent may still cancel the marriage, *Bail. Dig. M. L. 69.*

Lunatic.—It seems a lunatic may be disposed of in marriage by his guardian, *Hedaya*. A marriage contracted by a lunatic, or minor is void.

Consent of Guardian where Necessary to the Marriage of a Woman who has Attained Puberty—Change of Sects.—According to the doctrine of Abu Haneefa, a Mussulman female after arriving at the age of puberty without having been married by her father, or guardian becomes legally emancipated from all guardianship, and can select a husband without reference to the wishes of the father, or guardian; but according to the doctrine of Shafiî, a virgin, whether before, or after puberty, cannot give herself in marriage without the consent of her father, *Mahomed Ibrahim bin Mahomed Syed Purkar v. Goolam Ahmed bin Mahomed Syed Raghay*, 1 H. C. R., Bomb. 236.

After attaining puberty, a Mahomedan female of any

one of the four sects can elect to belong to which-ever of the other three sects she pleases, and the legality of her subsequent acts will be governed by the tenets of the Imaam, whose follower she may have become. A girl whose parents and family are followers of the school of Shafiî, and who has arrived at puberty, and has not been married, or betrothed by her father or guardian, can change her sect from that of Shafiî to that of Haneefa, so as to render valid a marriage subsequently entered into by her without the consent of her father, *ib.*

A woman having attained the age of puberty may contract herself in marriage with whomsoever she pleases, and her guardian has no right to interfere if the match be equal, *ib.*, § 14. If unequal the guardians may set it aside, *ib.* § 15. So in the case of a minor marrying without consent, *ib.* 16.

Breach of Promise of Marriage.—Promise of marriage, whether written or oral, cannot be enforced specifically. Marriage presents, or anything given in consideration, must be restored on breach of the contract, *Macn. Prin.* 250, 252.

Limitation.—But in both cases the guardians should interfere before the birth of the issue, *Macn. Ch. vii.* § 17.

Effect of Dissolution by Death.—Dissolution of a marriage contract by death leaves the parties, or their heirs, no more related, *Ekin Bebee v. Meer Ashruf Ali*, 1 *W. R. Civ. Rul.* 152. *Cal.*

Rights of Wife of Banished Husband.—So long as the wife of a banished Mahomedan remains his wife, and does not take measures to divorce herself, she is legally capable of maintaining an action for the recovery of debts due to her husband, 20 Dec. 1823, 2 *Borr.*, 639, *S. A. Bom.*

SECTION II.

DOWER.

Definition of—Extent of—When due—Should wife not claim payment during life of husband—Specification—Excessive dower not illegal—Largeness of amount—Where no amount fixed—Verbal contracts—Customary dower—Prompt or deferred—Wife cannot claim the whole of her dower as exigible while husband alive, and no specific amount declared to be exigible—Dower not exigible is not recoverable until death of husband—Due on consummation of marriage—Immediately demandable—Cohabitation cannot be enforced until paid—Half only demandable before consummation—Where dower not paid wife may refuse to return to cohabitation—Wife not compellable to reside with husband until dower has been paid—Dower demandable on divorce—Stipulation for larger sum than husband can pay—Dower due on husband's death is payable before claims of inheritance—Claim of dower takes precedence of claims of inheritance—Claim of dower must be satisfied before partition of heritage—Widow cannot take possession of her husband's real estate in lieu of dower without consent of heirs—Has lien upon her husband's property hypothecated for dower—Lien where property taken under decree before right disposed of—Moveable property—Heirs—Creditors—Seisin—Distinction between money and other property in cases of dower—Property not in possession cannot be subject of gift, whether in lieu of dower or otherwise—Marriage presents in lieu of dower—Evidence of widow's right to the property of her husband as dower—Evidence of the consent of the heirs to the widow's right to dower—Receipt by widow in part of dower—Property possessed by husband at his marriage, and relinquishment of her claim to residue—After acquired property is heritable by heirs—Right of heirs may be destroyed by alienation of lands for dower—Settlement of a man's property subsequent to settlement of dower does not vitiate first settlement—Settlement on junior wife of moiety of estate already settled on senior wife in lieu of dower—Where property had been separated from the husband's estate, and transferred to the possession of the first wife before the second marriage, the Bey Mokasee is invalid—When woman a minor—When man a minor—When husband and wife are minors—Estoppel—Not necessary that dower should be granted by deed—Evidence of—Limitation—There is no limitation in regard to claim for dower to a widow or her heirs—Relinquishment of dower—From what period limitation to be calculated.

• **Definition of.**—Dower is defined by Mr. Baillie (*Dig. M.L.*, p. 91) to be “the property which is incumbent on a husband,

either by reason of its being named in the contract of marriage, or by virtue of the contract itself, to give in exchange for the usufruct of his wife."

A widow is a creditor of her husband, for, according to Mahomedan law, dower is a necessary debt in case of a marriage, insomuch that there can be no contract of marriage without dower, *Macn.*, Ch. vii., § 20, *Prec.*, p. 279, Cas. xxix. Dower is considered as a debt, and is discharged as such, 2 *Borr.* 250, *Bomb. post.*, p. 253. There is no distinction between them, *Macn. Prec.*, 274. .

Dower—Extent of—When Due.—A necessary concomitant of marriage is dower, the maximum of which is not fixed, but the minimum of which is ten dirms,* and it becomes due on the consummation of the marriage (though it is usual to stipulate for delay as to the payment of part), or on the death of either party, or on a divorce, *Macn.*, ch. vii., *Prin.* 20, *Prec.*, Cas. xxiii. p. 276. *Prelim. Remarks*, xxv., xxvi.

Should the wife not claim the payment of it during the lifetime of her husband it must be paid to her out of the property left by him on his decease, *Macn. Prec.* 275.

By the *Sonee* doctrine of Huneefa, the extent of dower is not limited; the parties may extend it by agreement to what amount they please. Ten dirms is the lowest rate. Amongst the Shecas the lowest or highest rate is not fixed. Anything possessing a legal value may lawfully be given as dower; but the proper dower is 500 dirms; a greater sum is not illegal, although according to some of the lawyers of that sect it is improper, *Omduton Nisa Begum v. Mirza Asud Ali*, 1 *S. D. A.* 276.

That case was a suit by a wife against her husband, both of the Sheea sect, for the amount of her dower. It appearing that Rs. 500 was verbally specified at the reading of the ceremony in the Sheea form, but that a deed of settlement was executed by the husband for Rs. 100, held that the sum specified in the deed was legally demandable, *ib.*

* The value of a dirm is very uncertain. Ten dirms, according to one account, make about six shillings and eightpence sterling. See note to *Hamilton's Trans. of Hedaya*, vol. i. p. 122; *Macn.*, note, p. 59.

Excessive Dower not Illegal.—When the heirs of a Mussulman deceased claimed a share of his estate from his widow, who took the whole in satisfaction of dower, the principal ground of the claim, viz., that the amount of the dower which absorbed the whole estate was excessive, and therefore illegal, was rejected by the *S. D. A.*, as by the Mahommedan law excessive dower, however improper, is not illegal, and judgment was accordingly given dismissing the claim, *Wujih on Nisa Khanum v. Mirza Husan Ali*, 1 *S. D. A.*, *Beng. Rep.* 266, 30 Dec. 1808.

Largeness of Amount.—The production of a deed of dower is not indispensable to the truth and validity of a claim for dower; nor is such a claim to be set aside by reason of the largeness of the amount of dower, *Mulleeka v. Beebee Jumeela*, 5 *W. R. Civ. Rul.* 23. *Cal.*

When a deed of dower provided for an extravagant sum, and the estate of the deceased husband was insufficient to pay the amount, held, that the court at *Oude* had an equitable discretion, under the *Punjaub Code*, in awarding a reasonable compensation between the heirs of the deceased husband, and his widow, *Mulkah Do Alum Nowab Tajden Boboo v. Mirza Jehan Kudr*, 10 *Moore's In. Ap.* 252.

Where no Amount fixed.—Where no amount of dower has been specified the woman is entitled to receive a sum equal to the average rate of dower granted to the females of her father's family, *Macn.* ch. vii., § 21, *post.*, 247.

Verbal Contracts.—A verbal contract of dower for a large sum is admissible only if proved by most clear and satisfactory evidence, *Shah Nujummooddeen Ahmed v. Beebee Hosseinee*, 4 *W. R. Civ. Rul.* 110. *Cal.*

A Customary Dower must be proved by showing a custom of the women of the wife's family to receive, rather than the men of the husband's family to pay, a certain dower, the Mahommedan dower being the consideration paid by the bridegroom for the marriage, and therefore regulated by the position and dignity of the bride, especially as Mahommedan men contract most unequal marriages; though the means and position of the bridegroom must not altogether be excluded from consideration, *ib.*

DOWER.

The unreliable nature of the evidence for the defence does ease the plaintiff's failure to prove her case in a suit for dower, *ib.*

The very best description of evidence is required in support of a claim to dower, not resting upon any document but entirely upon oral testimony.

The status of the wife and not that of the husband fixes the amount of dower under Mahommedan law.

The fact of marriage with a second wife of low status, on whom an unexceptionably large dower was settled, is not conclusive evidence in support of a large claim for dower on behalf of the first wife, albeit she had some status, *Mussamut Hosseena v. Mussamut Hushumtoonissa*, 2 *Mad. Jur.* 239.

Prompt or Deferred.—Dower is usually divided into two parts, viz., 1st, prompt, which is immediately exigible; 2nd, deferred, which is not exigible until the dissolution of the marriage. Where it may not have been expressed, whether the payment of the dower is to be prompt or deferred, it must be held that the whole is due on demand, *Macn.*, ch. vii., § 22, 9 *Dec. S. D. A., N. W. P.* 33.

On the subject of Mahr Maujjil and Mahr Muwajjil, *i.e.* dower exigible and not exigible, also called prompt and deferred, there is much difference of opinion amongst the doctors. See *Hedaya*, 150, 151; *Macn. Prec.*, Case xxix., p. 279, note.

Wife cannot claim the whole of her Dower as exigible while Husband alive, and no Specific Amount declared to be exigible.—A wife cannot claim the whole of her dower as *exigible* while her husband is alive, where no specific amount has been expressly declared to be exigible. In such cases one-third of the whole must be considered *exigible* (Maujjil) and two-thirds not exigible (Muwajjil), such two-thirds being only claimable on the death of her husband, 3 *Dec. S. D. A., N. W. P.* 185.

In a suit by a Mahomedan wife against her husband for her dower, held, that the cause of action arose when the suit was instituted, and at no earlier period; and that, therefore, the claim was not barred under any of the sections of Act XIV. of 1859.

Held also, that where no specific amount of dower has been declared exigible, one-third of the whole should be considered exigible during the life of the husband, the remaining two-thirds being claimable on his death, *Fátmá Bibi Kone Sadruddin v. Sadruddin valad Nizamuddin*, 2 H. C. R. Bomb. 807.

Dower not Exigible is not Recoverable until Death of Husband.—Dower not exigible (Muwajjil) is not recoverable until the death of the husband, or the dissolution of the marriage by divorce, which last must be proved; and the mere fact of the husband and wife living separately is not sufficient evidence, 7 S. D. A., Beng. Rep. 40.

Though dower should be payable on demand the wife is not bound to sue for it immediately, nor in the lifetime of her husband, 6 Moore's In. Ap. 229.

Due on Consummation of Marriage.—Dower is due on the consummation of marriage, unless deferred by the terms of the settlement to a future period; and after the death of the parties the heirs of the wife are entitled to take the dower out of the husband's estate, deducting the husband's portion as one of the wife's heirs, if she die before him, 1 Hed. 123, Morley.

Dower immediately Demandable—Cohabitation cannot be Enforced until Paid.—Unless the contrary be specified, dower must be considered as immediately demandable, and till paid cohabitation cannot be enforced, 5 S. D. A., Beng. Rep. 76.

Half only Demandable before Consummation.—*Semble*, before the consummation of marriage, half dower is only demandable from the husband, *ib.*

But where the appellant admitted that the respondent was his wife, and that he had been in the habit of frequenting her residence, it was thought to be conclusive, and to render any inquiry unnecessary as to the fact of consummation, *ib.*

Where Dower not Paid Wife may refuse to return to Cohabitation.—A Mahomedan brought a suit against his wife to compel her to reside with him, and to restrain her parents from preventing her. The defence was, that as the plaintiff had not paid the wife her dower in full, he had

no claim upon her. Held, after obtaining the opinion of the Kazeer of the *S. D. A.*, from the decision in case No. 26, page 103, *Sel. Cas.* in 1843, that, “if the dower agreed to be paid immediately be not paid, a woman, although she has lived with her husband, may refuse to return to him until she receive her dower;” and as it had not been proved that the dower had been paid, the decision of the lower courts in the plaintiff’s favour was reversed, *Morris’s Sel. Dec. S.D.A., Bomb. 41.*

Wife not compellable to reside with Husband until Dower has been Paid.—A woman is not compellable to reside with her husband until the amount of her dower has been paid; and when a Mahomedan woman had obtained a decree against her husband for the recovery of her dower, but which decree had not been executed, nor the dower paid, and he brought an action to force her to reside with him, he was non-suited, and made liable for all costs, *Sel. Rep. S. A., Bom. 108; Hedaya, 150.*

Dower demandable on Divorce—Stipulation for larger Sum than Husband can Pay.—Dower is demandable on divorce; and with a view to the prevention of such a contingency, it is usual to stipulate for a larger sum than can ever be in the power of a husband to pay, *Macn. Prelim. Rem. p. xxv.*

The mode by which the wife is endowed, according to the Mahomedan law, partakes partly of the nature of a jointure, and partly of common dower, according to the law of England. Where the estate which she is to take is specified at the time of marriage, or subsequently thereto, it is a jointure to all intents and purposes, and the widow may enter upon it at once, without any formal process; but where no particular estate or amount in money may have been specified, she is entitled to her *mahr mistl*, or proportionate dower, which it must be admitted is but ill defined, being so much as it may be found to have been usual, on an average estimate, to endow other females of the same family with. But whatever the widow may gain in right of dower or jointure, she is not thereby precluded from coming in as one of the heirs, and claiming her indefeasible right of one-fourth, when her hus-

band may have died childless, and of one-eighth when he may have left children. It is a common practice (as was before observed) to stipulate for dower to an excessive amount, and as this claim precedes that of inheritance, it may be inferred that the rights of children, and other heirs are frequently defeated; but this is rarely the case. It seldom happens that a widow contracts a second marriage, and the property generally goes to the children of the original proprietor. There are weighty considerations in favour of the practice. Nothing seems so well calculated to preserve the peace, the property, and character of families, *ib.* xxvi.

Dower due on Husband's Death is Payable before Claims of Inheritance.—Dower due to a widow, on her husband's death, is payable from his estate, in preference to all claims of inheritance, *Wujih on Nisa Khanum v. Mirza Husan Ali*, 1 *S. D. A.*, *Beng. Rep.* 266.

Claim of Dower takes Precedence of Claims of Inheritance.—Claim, on the ground of dower, takes precedence of all claims of inheritance, consequently the heir (who had sold the property) has no power to transfer the property by sale till he has first paid the dower; and the claim by virtue of sale from him must be held contingent upon the claim of the widow for dower having been satisfied. The plaintiff, therefore, cannot claim possession under the deed of sale till he has first paid the dower, *Dec. S. D. A.*, 885, 2nd Sept. 1852.

It appeared that the widow had taken possession of the whole of her husband's estate, and *Mylton, J.*, dissented from part of the ruling of the Court, observing, "It has been shown by reference to a *fatwa* of the law officer of this Court, quoted in a note at the foot of p. 268, Vol. i. of *Sel. Reps.*, that a Mahomedan widow cannot take possession of real property of her husband without consent of his heirs, or judicial award on a claim to dower. Dower must, by the law, be satisfied before other claims, but it is only a liability for which the husband's estate is answerable: the holder of a claim to dower has no right to appropriate the entire estates to the satisfaction of his own claim to dower," *ib. note*. 1 *S. D. A.*, *Beng. Rep.* 266; 7 *ib.* 34.

Claims of Dower must be satisfied before Partition of Heritage.—Where A claimed half of his late father's estate, but it appeared that the deceased had settled 300,000 gold moheers on the mother of another son B, which, at her death, before her husband, was demandable by her heirs: it was held that the husband, one of those heirs, takes ten annas of her property (*i.e.* of the dower due), and B, her son, six annas; these six annas, therefore, of the dower were now demanded by B, from the paternal estate; and as claims of dower must be satisfied before partition of heritage A's claim of inheritance, in consequence, will not prevail, *Gholum Husun Ali v. Zeinub Beebee*, 1 S. D. A., Ben. Rep. 48, 20 July, 1801.*

A Widow cannot take Possession of her Husband's Real Estate in lieu of Dower without Consent of Heirs.—Landed or other immoveable property left by the husband cannot be taken by the widow in satisfaction of her claim of dower without consent of the heirs, or competent judicial authority, *Wujih On Nisa Khanum v. Mirza Husan Ali*, 1 S. D. A., Beng. Rep. 266.

A widow claiming dower cannot take possession of her husband's estate as against the heirs, but must sue them regularly for the amount due to her, *Bibee Selamut v. Shaikh Mowla Buksh*, 5 W. R. Civ. Rul. 194. Cal.

A Widow has a Lien upon her Husband's Property, Hypothecated for Dower.—A Mahomedan of the Sheea sect, by deed of dower, charged his whole estate with a certain sum when demanded by his wedded wife, but did not impignorate his estate to secure the sum put in settlement. The dower was not demanded during the lifetime of the husband, and his widow at his death took possession of his estate in satisfaction of his claim: held by the S. D. A. Court, affirmed by the Judicial Committee, that the widow had a lien upon her husband's estate as being hypothecated for her dower, and could either retain property to the amount of her dower, or alienate part of the estate in satisfaction of her claim, *Ameer-oon-Nissi v. Moorad-oon Missa*, 5 Moore's In. Ap. 211.

* It seemed that the estate was insufficient to cover B.'s claim.

Widow—Lien on Husband's Estate.—The widow of a Mahommedan in possession of her husband's estate, under a claim of dower has a lien upon it, as against those entitled as heirs, and has a right to possession as against them until her dower is satisfied, *Muss Janee Khanum v. Muss Amatoool Fatima Khanum*, 8 W. R. Civ. Rul. 51. Cal.

Property taken under Decree before Right Disposed of—Lien.—Property taken under decree from a Mahommedan widow before the question of her right of dower is disposed of, is taken subject to her right of lien, *ib.*

The widow in possession of her husband's estate under a claim of dower has a lien upon it, and is entitled to possession as against those entitled as heirs till her claim is satisfied, *Woomatool Fatima Begum v. Meerunmun Nissa Begum*, 9 W. R. Civ. Rul. 318. Cal.

Should the widow in such a case be deprived of possession by a decree in favour of heirs, who take with notice of her claim to dower, and more particularly where her right to sue has been expressly reserved, the heirs take subject to a lien, of which the property is not divested by the decree, *ib.*

In a case in which the widow had after many years of possession, been compelled to make over one-sixth of her estate to her mother-in-law, and then sued her mother-in-law for one-sixth of her dower without interest, she was held entitled to recover her claim without deduction on account of *Wasilut*, *ib.*

Distinction between Money and other Property in Cases of Dower.—There is this distinction between money, and other property in cases of dower; namely, that the widow is at liberty to take the former description of property, over which she has absolute power; but, as to the other property, she is entitled to a lien on it, as security for the debt, and it does not become her property absolutely without the consent of the heirs, or a judicial decree. Where the debt is large and the estate small, the former necessarily absorbs the latter, in spite of any objection urged by the heirs, who, until they pay the debt, have no legal claim against the creditor in possession to deliver up the estate, *Macn. Prec.* 275.

Moveable Property—Heirs—Creditors.—Moveable pro-

perty may, however, be taken by her, as far as the heirs are concerned, but not to the prejudice of other creditors in payment of dower indisputably due, *Wujih on Nisa Khanum v. Mirza Husan Ali*, 1 *S. D. A.*, *Rep.* 266.

Seisin.—Immediate seisin is not requisite in cases of property exchanged for dower, as it is an exchange or sale, and not a gift, *Macn. Prec.* 276 ; but the absence of seisin within the statutory period would render the exchange inoperative, 5 *A. Pro.* 27 August, 1857, on *Miscel. Pet. No. 369* and 11 March, 1858, on *Mis. Pet. No. 478* of 1857.

Property not in Possession cannot be Subject of Gift, whether in lieu of Dower or otherwise.—A Kabin-namah, or deed of marriage settlement, containing a gift by a husband to his wife of the whole property possessed by him, *or which might thereafter come into his possession*, is valid under the Mahommedan law with regard to the property actually in possession of the husband, but not with regard to that of which he was not possessed, *Oopidhea Beebee v. Mohun Beebee*, 6 *S. D. A.*, *Ben. Rep.* 30 ; 30 June, 1835.

The deed was looked upon simply as a deed of gift ; the decision proceeded, therefore, on the ground that, by the Mahommedan law property non-existent cannot be made the subject of gift ; whether in lieu of dower or otherwise.

“Non-existent” hardly conveys the idea ; the property may be in existence, but if the grantor is not possessed of it, he cannot convey it.

A bakin-namah, therefore, is invalid in respect to property not in possession of the husband at the time of the execution of the deed, 7 *S. D. A.*, *Ben. Rep.* 158 ; 16 March, 1843.

Marriage Presents in Lieu of Dower.—Where marriage presents were delivered by a Mahommedan to his wife with due notice at the time that they were sent in lieu and satisfaction of dower, the formal acknowledgment to that effect by the wife, or her friends was not held to be necessary. But where there was a want of proof on the husband's part of the delivery of the marriage presents, the Court held, that the wife was entitled to obtain from him possession of her dower, 2 *Borr.* 258 ; *S. A. Bomb.*

Evidence of the Consent of the Heirs to the Widow's right to Dower.—One of the heirs of the husband having for several years acted as manager for his widow, who had taken possession of her husband's landed estate in satisfaction of her dower, while none of the other heirs preferred any claim to the estate, may be considered as sufficient evidence of consent on the part of the heirs of the widow's right, *Wujih on Nisa Khnum v. Mirza Husan Ali*, 1 S. D. A. 266.

A written acknowledgment of the husband to one of his wife's heirs, after her death, was held to be sufficient proof of the amount settled upon her as dower, *Ali Buksh Khan v. Kaeen Beebee*, 1 S. D. A. 83.

Receipt by Widow in part of Dower of Property possessed by Husband at his Marriage, and Relinquishment of her Claim to Residue—After acquired Property, is Heritable by Heirs.—In a suit by the heir of the son of A, against the widow of A, for a share of his estate as joint heir with the widow, the widow pleaded that the whole estate fell to her in payment of dower; there being proof that she had received, in part of her dower, the property possessed by the husband at his marriage, and that she afterwards remitted her claim to the residue; it was held, that under such circumstances, the property acquired by A, after marriage, was his estate, heritable by his heirs, and judgment was accordingly given that the claimant should obtain the share due to him as an heir of the son of the deceased, *Ahmud Ollah v. Behar Ullah*, 1 S. D. A. 284.

The Right of the Heirs may be Destroyed by Alienation of the Lands for Dower.—A Mahomedan may alienate land to his wife in compensation for her dower, and the heirs have no claim upon it, because dower is a debt, and debts must be first liquidated out of the estate, 2 *Borr.* 520, S. A., *Bomb.*

Settlement of a Man's Property subsequent to Settlement of Dower, Wife consenting does not Vitate First Settlement.—An alleged settlement of a man's property made subsequent to a settlement of dower, and asserted to have been made with the consent of his wife shortly before

her death, she receiving a share of such property under the second settlement in lieu of dower, was held not to vitiate the Mahernameh in possession of her daughters, nor to bar their claim against their father for their share of the mother's dower, as the conditions of the second settlement were not proved to have been fulfilled, 1 *Dec. S. D. A., N. W. P.* 128.

Settlement on Junior Wife of Moiety of Estate already settled on Senior Wife in Lieu of Dower.—A *Kabinnameh*, or deed of marriage settlement, executed by a Mahomedan to his junior wife, for a moiety of his estate, was held to be invalid, he having previously settled his entire estate on his senior wife, in lieu of dower, and the deed in question having been executed without her permission duly obtained, *Muss Banoo Beebee v. Fukheeroodeen Hosein*, 2 *S. D. A., Ben. Rep.* 180. The proper course was for the senior wife to have executed an *Ikrarnameh* in favour of the junior wife, thereby granting permission to their husband to make over a moiety of the property, in lieu of dower, to the junior wife. He might then have settled such moiety upon her, and such act would have been legal and valid, it resembling the act of an agent confirmed by his principal, *ib.*

Where the Property had been Separated from the Husband's Estate, and transferred out of the Possession of the First Wife before the Second Marriage, the Bay Mokasee is Invalid.—Where a husband settled certain property on his first wife, in lieu of dower, but without specification in the dower deed, which merely stated "the whole of his property," and on her death married a second wife, to whom he executed a deed of *Bay Mokasee* or barter of a portion of the same property in lieu of the dower settled upon her; it was held, that as the property had been separated from the husband's estate, and transferred to the possession of the first wife before the second marriage took place, the *Bay Mokasee* was invalid, but that this result would have been obviated, and the second wife would have been entitled to the portion of the estate settled therein, had no such separation taken place up to the period of the second marriage, *Shaik Futteh Ali v. Mt. Janwa*, 6 *S. D. A., Ben. Rep.* 178.

Where Woman a Minor.—A girl betrothed by her father, during her minority, cannot set aside such betrothal on coming of age. It is competent, however, to the woman to refuse to leave her parents without payment of the *Mahr Maujjil*, or exigible dower settled upon her at the time of her betrothal, *Mt. Fukhranissa v. Shah Ali Ruzzah*, 6 S. D. A., *Ben. Rep.* 293; see *Past Carriage*.

Where Man a Minor.—Dower fixed by a minor husband is not recoverable, unless his marriage was contracted, and the dower fixed with the consent of his guardian, *Macn. Prec.* 271.

Where Husband and Wife are Minors.—Where, in a marriage of two minors, the legal guardian of the husband not having been present at the marriage, and not having given his consent to the dower, and the husband, on coming of age, had not confirmed his acknowledgment of the dower, it was held, that the dower was demandable from the husband, 2 S. D. A., 233 *Ben. Rep.*

Not necessary that Dower should be Granted by Deed.—Where a claim was made to certain lands in satisfaction of dower, there being no other assets, the Court awarded possession of them to the widow, if they did not exceed in value her proper dower, or such as would be proportionate to the rank and circumstances of her family, although no deed of dower might be forthcoming, *Uzeezoo Nissa v. Cuboo Ali Khan*, 3 S. D. A., *Ben. Rep.* 321.

A deed is not necessary in cases of dower, *Macn. Prec.* 286. A deed of dower conveying the husband's proprietary right in land of which he was not then proprietor, but which came subsequently into his possession is void, unless he put the wife in formal possession after he became seised of it, *Macn.* 290, *ante*.

Evidence of.—A deed is not essential to the validity of a grant of dower, although no doubt the grant is so seldom made in any other manner as to render great strictness of proof necessary, in order to establish a right by parol evidence. Again, supposing it to be admitted that the grant in question was made by deed, there is no legal objection in

the abstract to its being proved by other evidence than the document itself, *Tajoo Bebee v. Noorun Bebee*, 1 *W. R.*, *Civ. Rul.* 31.

A verbal contract for dower is valid by the Mahommedan law, even by a minor, who is an adolescent; the use of deeds is only for a securer record, 5 *S. D.A.*, *Ben. Rep.* 75. It was presumed from the evidence in this case, that the marriage had been consummated, notwithstanding the youth of the parties; otherwise half dower would only have been claimable. The opinion of the law officer as to the adolescent's power and liability, was given without reservation; but it must be remarked that, in this case, the uncle and tutors of the minor were present at the time of making the contract,—a verbal one,—and assented thereto, *ib. note*.

The best description of oral testimony is necessary to support a claim for dower where no Kabin namah is produced, *Muss Hasseend v. Muss Husmetoonissa Bibee*, 7 *W. R.* *Civ. Rul.* 495. *Cal.*

Limitation.—There is no limitation in regard to a claim for dower by a widow or her heirs. The widow of a Mussulman sued his heirs for dower, they having ousted her from possession of his estate, which she had taken in satisfaction thereof. The Court decreed in her favour for the amount claimed, although her suit was not commenced until twenty years after the death of her husband, 5 *S. D.A.*, *Ben. Rep.* 105.

Relinquishment of Dower.—A Mahomedan widow having sued for recovery of dower, nine months after her husband's death, her claim was resisted, because thirty-five years had elapsed since the marriage; because she had relinquished her dower to her husband; and because he had constituted the whole of his property *wuqf* before his decease. The Court overruled the plea of limitation, but dismissed the claim (apparently on the second objection), on the ground that, "Although the deceased conveyed away the whole of his property, in trust, for religious uses in 1845, under circumstances which establish by strong presumption the fact of the plaintiff's cognizance, no objection was made,

nor was any claim for dower set forth until 1847, by which time the husband and wife had broken out into open quarrels," 6 *Dec. S. D. A., N. W. P.* 288.

Exigible dower, not demanded during the period limited by the regulations for the cognizance of actions, cannot be subsequently recovered, 1 *S. D. A., Ben. Rep.* 103 ; 7 *ib.* 40.

In this case, the widow was held to be entitled to two-thirds of the dower claimed, one-third only being the *maujjil* (or payable on her marriage), the recovery of which was barred by the rule of limitation, and the remaining two-thirds being *muwajjil*, not exigible, during the continuance of marriage, and payable on the death of her husband, which happened only six years before the action, *ib. note*.

The widow's heirs may claim her dower at any time, *Macn. Prec.* p. 287, Case xxiii., and the dower of a deceased woman is even claimable by her grandchildren, notwithstanding any lapse of time, *ib.* 365.

By British Legislation.—This is the rule with regard to Mahomedan law, but not with regard to the law of limitation, as enacted by the British Reg. See *Macn. Prec.* 287, *note*.

A demand of the dower during the husband's lifetime is not necessary, and although more than twelve years had elapsed from the date of the deed, and the time that the widow set up her claim for dower, she was not affected by the provisions of *Ben. Reg.* iii. of 1793, sect. 14, and the limitation there provided for formed no bar to her claim, 5 *Moore's In. Ap.* 211 ; *ante*, p. 250.

Where the heirs of a widow claimed her dower from her late husband's estate, under a deed executed by him before the Company's accession to the *Dewani*, it was held, that such claim was inadmissible, the truth of the demand not having been acknowledged within twelve years prior to the institution of the suit, *Moohammed Yar Khan v. Moohammed Eesau Khan*, 3 *S. D. A., Ben. Rep.* 292.

The following note is appended by Mr. Morley to this case, See the case of *Ali Buskh Khan v. Kaeem Beebee*, decided 24th of August, 1824, 13 *D. A.* 83, in which case judgment was given for the daughter of deceased Mahomme-

dan, against the male relatives in possession of his estate, for a half share of the dower of her mother unpaid during the life of the mother, whom the father survived. But in that case, it appeared in evidence, that the father, subsequently to his wife's death, and not twelve years before the institution of the suit, had acknowledged the debt of dower to be due. There does not appear to have been any case yet decided, in which prescription from length of time has been held sufficient to bar the claim of a wife to her dower, should such occur, the *reverentia maritalis* might possibly be considered to operate in her favour, agreeably to the doctrine of the Scotch law (see *Erskine's Principles*, p. 369). But with respect to the heirs of widows, or even perhaps to the case of widows themselves, who may have suffered a long period to elapse after the death of their husbands, without preferring any claim, the Rules of Limitation may be strictly applicable.

From what period Limitation to be calculated.—In a suit by the widow to recover from the joint heirs of her husband the amount of dower due under her marriage settlement, the period of the cause of action must be calculated from the date on which the widow was ejected by order of Court from the property of which she had at first retained possession in lieu of dower, and from the date on which the heirs were, as such, placed in a position to be sued, *Dec. S. D. A., Ben.* 841, 1856.

* Where the heirs had been kept out of possession by a widow on the ground that she held, in satisfaction of her dower, and the heirs had afterwards recovered possession, the merits of the dower not being tried, she was allowed to bring her suit twenty years after her husband's death, *ib.*

Mahomedan Widows.—A suit by a Mahomedan widow against the heir who had ousted her from her husband's estate, which she possessed under a claim of dower, to establish her lien is one, the limitation of which is either governed by clause 16, sect. 1, Act XIV. of 1859; or if she sues to enforce her lien on landed property, as subject to a lien, cl. 12 may apply, *Muss. Janee Khanum v. Doss. Amatoool Fatima Khanum*, 8 M. R. Civ. Rul. 51. Cal.

Held, that the period prescribed by the Limitation Act does not begin to run in the lifetime of her husband against a Mahommedan woman's claim for dower until she has demanded such dower. Held also, that separation does not make it incumbent upon her to make any such demand, *Nathi v. Dand.* 2 H. C. R. Bomb. 309.

Maintenance.—If payment of dower be unjustly withheld, the wife, as we have seen, may refuse to reside with her husband, and she may enforce maintenance from him, *Macn. Prec.* 281, 282. Refusal of the husband to allow maintenance to his wife cannot, however, justify her in seeking a divorce, *Dec. S. B.* 46, in *A. S.*, No. 172 of 1857.

SECTION III.

OF DIVORCE.

Husband may divorce his wife without misbehaviour—or for misbehaviour—Divorce purchased by wife not demandable as a right—Impotency—Julak and Khoola divorce—Evidence of divorce—Restitution of conjugal rights—Dower—Adultery—Ill-treatment of wife—Instrument of—By minors—Must take effect from date—Conditions precedent to re-union—Of death-bed divorce—Maintenance of divorced wife—What amounts to divorce—Suit by wife after, to recover her property.

Husband may Divorce Wife without her Misbehaviour.—A husband may divorce his wife without any misbehaviour on her part, or without assigning any cause ; but before the divorce becomes irreversible, according to the more approved doctrine, it must be repeated three times, and between each time the period of one month must have intervened, and in the interval he may take her back either in an express, or implied manner, *Macn.*, ch. vii. § 24.

Or for Misbehaviour.—Another mode of separation is by the husband's making oath, accompanied by an imprecation as to his wife's infidelity ; and if he in the same manner deny the parentage of the child of which she is then pregnant, it will be bastardized, *Macn.* ch. vii. § 60.

Of Divorce Purchased by Wife.—A wife is at liberty, with her husband's consent, to purchase from him her freedom from the bonds of marriage, *Macn.* ch. vii. § 28.

Not Demandable as a Right.—Divorce is not demandable as a right by the wife on payment of a consideration, 5 *S. D. A.*, *Ben. Rep.* 200, 5 May, 1832.

Impotency.—Established impotency is also a ground for admitting a claim to separation on the part of the wife, *Macn.*, ch. vii. § 30.

Julak and Khoola Divorce.—Provision is made by Mahomedan law for divorce in either of two forms, 1st, *Julak*, 2ndly, *Khoola*; *Moonshee Bazul-ul Roham v. Lutsifat-oon-misee* 6 *Moore's In. Ap.* 379.

A divorce by *Julak* is the mere arbitrary act of the husband, who may repudiate his wife with, or without cause; but in a divorce of that kind a husband is liable to repay *dyn-mohr*, or the wife's dower and, *semble*, to give her jewels and paraphernalia, *ib.*

A *Khoola* divorce is with the consent, and at the instance of the wife, for which she gives a consideration to her husband for the release of the marriage tie, *ib.* But the non-payment by the wife of the consideration-money does not invalidate such divorce, *ib.*

Divorce by *Julak* is not complete and irrevocable by the non-declaration of the husband. But a *Khoola* divorce is at once complete, and irrevocable from the moment the husband repudiates the wife, and a separation takes place, *ib.*

Evidence of Divorce.—The Mahomedan law does not provide for the nature of the evidence to prove a divorce, *Buksh Ali v. Amarun Bibee.*

Quære. As to the husband's statement, that he has divorced his wife, being sufficient proof of the fact, *ib.*

Restitution of Conjugal Rights—Divorce—Dower, Adultery, Ill-treatment of Wife.—A charge of adultery by a Mahomedan against his wife does not operate as a divorce, though if false, it might be an item of ill-usage towards making up a sufficient answer to his claim for restitution of conjugal rights. The husband cannot enforce his right to his wife till he pays the dower, in the absence of any suffi-

cient answer to his claim. Ill-treatment by him and his second wife would justify the first wife in leaving him, *Jawn Beebee v. Shiekh Moonshee Beharee*, 3 *W. R. Civ. Rul.* 93. *Cal.*

Instrument of—is valid, if signed by husband in presence of, and given to the wife's father, although not signed in presence of the wife, *Muss. Waj Bibee v. Azmut Ali*, 8 *W. R. Civ. Rul.* 23. *Cal.*

By Minors.—Divorce by a minor has no legal operation, *Macn. Prec.* 272.

Must take Effect from Date.—A divorce cannot be referred back to an antecedent period. It must take effect from the date on which it is declared, *Macn. Prec.* 296.

Conditions Precedent to Re-union.—A husband cannot again cohabit with his wife who has been three times irreversibly divorced, until after she shall have been married to some other individual, and separated from him either by death, or divorce; but this is not necessary to a re-union if she have been separated by only one, or two divorces, *Macn. ch. vii. § 25.*

Of a Death-bed Divorce.—If a husband divorce his wife on his death-bed, she is, nevertheless, entitled to inherit, if he die before the expiration of the term (four months and ten days) of probation, which she is bound to undergo before contracting a second marriage, *Macn. ch. vii. § 26.*

Maintenance of a Divorced Wife.—A divorced wife is entitled to maintenance, and habitation during the term of probation, *Macn.* 298.

What Amounts to a Divorce.—A vow of abstinence made by a husband, and maintained inviolate for a period of four months, amounts to an irreversible divorce,* *Macn. ch. vii. § 27.*

Mere separation without divorce does not dissolve the marriage tie, *Macn. Prec. p.* 118.

* There is a recognized species of irreversible divorce which is effected by the husband comparing his wife to any member of his mother, or some other relation, prohibited to him, which must be expiated by emancipating a slave, by alms, or by fasting. This divorce is technically termed *Zihar*, *Hedayah*, Book 4, Ch. ix.; *Bail., M. L., Divorce.*

Suit by Wife against Husband after Divorce for Recovery of Property belonging to her, which her Husband held before Divorce.—The cause of action arose at the time of separation, the possession of the husband being the possession of the wife; the onus lies upon the husband to prove his right to the property, till that is done the presumption is, that the property so held by the husband was held by him on behalf of the wife, *Abdool Ali v. Kurrumnissee*, 9 W. R. Civ. Rul. 153. Cal.

SECTION IV.

OF PARENTAGE.

Rules relative to—Relative to children of female slaves—Acknowledgment of parentage.

Rules Relative to Parentage.—A child born six months after marriage, is considered to all intents and purposes the offspring of the husband; so also is a child born two years after the death of the husband, or after divorce, *Macn.* ch. vii., § 31.

Relative to the Children of a Female Slave.—The first-born child of a man's female slave is considered his offspring, provided he claim the parentage, but not otherwise; but if, after his having claimed the parentage of one, the same woman bear another child to him, the parentage of that other will be established without any claim on his part, *Macn. ib.* § 32.

The children by slave girls inherit equally with the children of free married women, *Macn. Prec.* p. 85.

Acknowledgment of Parentage.—If a man acknowledge another to be his son, and there be nothing which obviously renders it impossible that such relation should exist between them, the parentage will be established, *Macn.* ch. vii. § 33.

The acknowledgment of parentage alone would not suffice

to give the bastard by a free woman a right of inheritance to his reputed father's property, *Macn.* ch. vii. p. 61, *note*.

The subject is discussed at greater length *ante*, p. 10.

SECTION V.

MINORITY.

When it ceases—Regulation period—Liability for necessary debts—Incompetency to control—May receive gift—Onus of proof that deed was beneficial to minor—Responsibility of.

When Minority Ceases.—The period when minority ceases is the same for males and females, viz., the conclusion of the 16th year, or the period of puberty, whichever is the earlier, *Macn.* ch. viii., § 1. The period of puberty varies from nine years upwards.

Reg. 26 of 1793 (extending the period of minority of proprietors of estates paying revenue to the Government, from the end of the 15th to the end of the 18th year), applies to proprietors out of, as well as those, in possession, and is not overridden by the law with reference to the validity of the marriage contract, which may be dependent upon physical considerations; and even the Mahommedan law is vague and uncertain as to the time at which a woman arrives at majority, owing to her having attained to puberty, *Ranee Roshun Johan v. Rajah Syud Enaet Hossein*, 5 *W. R. Civ. Rul.* 4. *Cal.*

In the case of a Mahommedan not subject to the Court of Wards, the limit of minority is at least 16 years, *Abdool Oahab Chowdhry v. Muss Elias Banoo*, 8 *W. R. Civ. Rul.* 301. *Cal.*

Liability for Necessary Debts.—Necessary debts contracted by any guardian for the support, or education of his ward, must be discharged by him on his coming of age, *Macn.* ch. viii. § 11.

Incompetency to Contract.—A minor is not competent

sui juris to contract marriage, to pass a divorce, to manumit a slave, to make a loan, to contract a debt, or to engage in any other transaction of a nature not manifestly for his benefit, without the consent of his guardian, *ib.* § 12.

May Receive a Gift.—But he may receive a gift, or do any other act which is manifestly to his benefit, *ib.* § 13.

Onus of Proof that Deed was Beneficial to Minor.—The *onus* of proving that a deed of compromise was beneficial to a minor, is on the party making the allegation in a transaction in which the minor is alleged to have given up her title to a large estate for a very inadequate maintenance, and when the minor withdraws her right of appeal as to a portion of the property, and waives her right of cross-appeal to the remainder, *Ranee Roshun Jahau v. Rajah Syud Enaet Hossein*, 5 W. R. Civ. Rul. 4. Cal.

A minor can sue only with consent of his guardian, *Macn. Prec.* 310.

Responsibility of.—Minors are civilly responsible for any intentional damage, or injury done by them to the property, or interests of others, *Macn. ch. viii.* § 16.

SECTION VI.

GUARDIANSHIP.

Two kinds of—Subdivisions—Proximate and remote—Maternal Relation—Infant's custody—When mother loses the right—Paternal relations—Acts of guardians—Contracts with regard to immoveable property—With regard to moveable.

Two kinds of Guardians.—Guardians are either natural, or testamentary, *Macn. ch. viii.* § 4.

Subdivisions.—These are also distinguished as, near or remote. Of the former description are fathers and paternal grandfathers, and their executors, and the executors of such executors. Of the latter description are the more distant paternal kindred, their guardianship extending only to mat-

ters connected with the education and marriage of their wards, *Macn.* ch. viii. § 5.

The mere proximate guardians have power over the property of the minor for purposes beneficial to him. In default of these, this power does not vest in the remote guardians, but in the ruling power, *Macn.* ch. viii. § 6.

Maternal Relations are the lowest species of guardians: their right of guardianship for the purposes of marriage, and education taking effect only where there are no paternal kindred, nor mother, *Macn.*, ch. viii. § 7.

Infants' Custody.—Mothers have the right to the custody of their sons till they attain the age of seven, and of daughters until puberty, *Macn.* ch. viii. § 8. Where a Mahomedan woman was divorced from her husband, and who was not shown to be of bad character, held, that her claim to the guardianship of their daughter up to nine years of age was superior to that of the father, 30 July, 1849; *Sel. Dec.*, *S. D.*, *Bomb.* 29.

Mother Loses the Right of Custody.—The mother's right is forfeited by marrying a stranger, but revests, on her again becoming a widow, *Macn.* ch. viii. § 9. Her marriage with a near relation does not deprive her of the rights of a guardian, *Macn. Prec.* p. 307.

Paternal Relations.—The paternal relations succeed to the right of guardianship for the purposes of education, and marriage, according to the proximity of their claims, to inherit the minor's estate, *Macn.* ch. viii. § 10.

Acts of Guardian.—The acts of a guardian with regard to the minor's immoveable property are not binding on him, unless they are for necessary purposes, or for his benefit, *Macn.*, ch. viii. § 14.

Contracts with regard to Immoveable Property.—Thus, he is not at liberty to sell the immoveable property of his ward, except under seven circumstances, viz., 1, When he can obtain double its value. 2, Where the minor has no other property, and the sale of it is absolutely necessary to his maintenance. 3, Where the late incumbent died in debt, which cannot be liquidated except by the sale of the property. 4, Where there are some general provisions

in the will which cannot be carried into effect without such sale. 5, Where the produce of the property is not sufficient to defray the expenses of keeping it. 6, Where the property may be in danger of being destroyed. 7, Where it has been usurped, and the guardian has reason to fear that there is no chance of fair restitution, *ib.*

With respect to Moveable Property.—Every contract entered into by a near guardian on behalf of, and for the benefit of the minor, and every contract entered into by a minor with the advice, and consent of his near guardian, as far as regards his personal property is valid, and binding upon him, provided there is no circumvention, or fraud on the face of it, *Macn.*, ch. viii. § 15.

We have treated of the marriage of minors, of their dower and divorce, under these heads respectively, see *ante*, pp. 240, 254, 260.

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